(25,957)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 505.

ANDREW D. BARBOUR, PLAINTIFF IN ERROR,

vs.

THE STATE OF GEORGIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

INDEX.

	Original.	Print
Transcript of record from the city court of Savannah	1	1
Bill of exceptions	1	1
Verdict	1	1
Judge's certificate to bill of exceptions	5	3
Clerk's certificate to bill of exceptions, &c.	6	3
Indictment	8	4
Plea and verdict	12	6
Sentence	13	6
Motion for new trial	15	7
Order on motion for new trial	16	7
Amendment to motion for new trial	18	8
Order refusing motion for new trial	23	10
Motion to arrest and set aside judgment	24	10
Order to show cause	27	12
Order overruling motion in arrest of judgment, &c.	27	12
Order overruling motion in arrest of judgment, &c.	29	12
Brief of evidence	30	13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 4, 1917.

	Original.	Print
Testimony of —— Harley	30	13
—— Chapman	31	13
T. F. McKay	32	14
Phillip Horning	33	14
—— Fraser	36	16
—— Browlsoy	37	16
—— Harley (recalled)	40	18
J. A. Woods	40	18
Statement of defendant	41	18
Judge's approval of brief of evidence	43	19
Charge of the court	45	20
Pauper's affidavit	54	23
Clerk's certificate	55	24
Judgment	57	24
Opinion, Gilbert, J.	58	25
Dissenting opinion, Fish, C. J., and Atkinson, J.	66	28
Writ of error	67	29
Citation and service	69	30
Petition for writ of error	70	31
Assignments of error	74	32
Order allowing writ of error	76	34
Bond on writ of error	77	34
Praecipe for record	78	35
Clerk's certificate	80	36

1 STATE OF GEORGIA,
County of Chatham:

To the Court of Appeals of Georgia:

Be it remembered that on June 17th, 1916, Walter C. Hartridge, Solicitor General of the Eastern Judicial Circuit of Georgia, who prosecutes in the City of Savannah, preferred an accusation against Andrew D. Barbour, charging him with the offense of a misdemeanor; the specific allegations in said accusation being contained in six counts, each of said counts charging a violation of the prohibition laws of the State of Georgia.

Be it further remembered that on the 20th day of June, said case was regularly called for trial in the City Court of Savannah, Hon. John Rourke, Jr., Ex-Officio Judge of the City Court of Savannah, then and there presiding. Said Andrew D. Barbour plead not guilty and thereupon a jury was duly empanneled to try the issue formed upon said accusation; evidence was submitted and the Court charged the jury, who retired and subsequently returned the following verdict:

"June 20th, 1916.

We, the jury, find the defendant guilty on the fourth count.

W. B. McKINSTRY, *Foreman.*"

Be it further remembered that said Andrew D. Barbour, being dissatisfied with said verdict, afterward, to-wit: on the same day filed his motion for a new trial. Said motion for a new trial constitutes a part of the record in said case, to which express reference is

2 hereby prayed.

Be it further remembered that on the 24th day of June, said Andrew D. Barbour, filed his motion in arrest of judgment, which said motion constitutes a part of the record in said case, to which express reference is hereby prayed.

Be it further remembreed that on June 29th, said Andrew D. Barbour, filed a brief of evidence in said case; said brief of the evidence constitutes a part of the record in said case, to which express reference is hereby prayed.

Be it further remembered that on August 8th, 1916, said Andrew D. Barbour filed a copy of the charge of the Court, which said charge of the court constitutes a part of the record in said case, to which express reference is hereby prayed.

Be it further remembered that on the 8th day of August, 1916, the hearing on said motion for a new trial, which had been regularly postponed, coming on for a hearing, said Andrew D. Barbour, presented an amendment to the motion for a new trial, which amendment the court declined to approve for the reason set forth in his order passed upon the same day.

Be it further remembered that after hearing argument on the

motion for a new trial, the court passes his order overruling and denying said motion for a new trial upon each and every one of the grounds of the original motion.

3 Be it further remembered that the court upon the same day passed his order overruling and denying the motion in arrest of judgment.

To the order and judgment refusing to certify the grounds of the amended motion Andrew D. Barbour then and there excepted and now excepts and assigns the same as error and says the court should have certified said grounds of amended motion and erred in refusing so to do.

To the order and judgment overruling and denying the motion for a new trial said Andrew D. Barbour then and there excepted and now excepts and assigns the same as error and says the court erred in overruling and denying his motion for a new trial upon each and every one of the grounds in the motion for a new trial.

To the order and judgment overruling and denying Andrew D. Barbour's motion in arrest of judgment, said Andrew D. Barbour then and there excepted and now excepts and assigns the same as error and says the court erred in overruling and denying his motion in arrest of judgment and should have sustained the same.

And the said Andrew D. Barbour, hereby specifies as material to a clear understanding of the errors complained of the following parts of the record in said case:

First. The accusation against Andrew D. Barbour on June 17th, with all the entries and endorsements thereon.

Second. The verdict of the jury returned June 20th, 1916.

Third. The sentence of the court passed June 20th, 1916.

Fourth. The motion for a new trial filed June 20th, 1916,

4 with all the entries and endorsements thereon, together with the entry of filing.

Fifth. The motion in arrest of judgment filed June 24th, 1916, with all the entries and endorsements thereon together with the entry of filing.

Sixth. The brief of the evidence filed July 29th, 1916, with all the entries and endorsements thereon together with the entry of filing.

Seventh. The charge of the court filed August 8th, 1916, with all the entries and endorsements thereon together with the entry of filing.

Eighth. The amendment to the motion for a new trial filed August 8th, 1916, with all the entries and endorsements thereon together with the entry of filing.

Ninth. The order passes August 8th, 1916, refusing to certify the grounds of amended motion for a new trial.

Tenth. The order passed August 8th, 1916, overruling and denying said Andrew D. Barbour's motion for a new trial.

Eleventh. The order passed August 8th, 1916, overruling and denying said Andrew D. Barbour's motion in arrest of judgment.

And now within the time allowed by law comes the said Andrew D. Barbour and tenders this his bill of exceptions and prays that the

same may be signed and certified as such that the errors alleged to have been committed may be considered and corrected.

ROB'T L. COLDING,
Counsel for Plaintiff in Error.

P. O. Address, Savannah, Georgia.

5 I do hereby certify that the foregoing bill of exceptions is true and specifies all of the evidence; and specifies all of the record material to a clear understanding of the errors complained of and the Clerk of the City Court of Savannah is hereby ordered and directed to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified and to certify the same as such and to cause the same to be transmitted to the March Term of the Court of Appeals of Georgia, that the errors alleged to have been committed may be considered and corrected.

This 11th day of August, 1916.

JNO. ROURKE, JR.,
Judge City Court of Savannah.

6 In the City Court of Savannah.

I, Thomas S. Russell, Deputy Clerk of the City Court of Savannah, do hereby certify that the within and foregoing constitutes the true original Bill of Exceptions in the case of A. D. Barbour, Plaintiff in Error vs. The State of Georgia, Defendant in Error, filed in the Clerk's Office of the City Court of Savannah, August 21st, 1916.

I do further certify that the July Term of the City Court of Savannah commenced its session on July 3rd, 1916, and that the same is still in session as appears from the minutes of the said Court.

In Witness Whereof I have hereunto set my official signature and affixed the Seal of the City Court of Savannah, at Savannah, Georgia, this August 25th, 1916.

THOMAS S. RUSSELL,
Deputy Clerk City Court of Savannah.

Due and legal service of the within Bill of Exceptions acknowledged, copy received. All other and further notice and service waived.

Aug. 21st, 1916.

WALTER C. HARTRIDGE,
Sol. Gen., E. J. C., Ga.

Filed in office Aug. 21, 1916. Thomas S. Russell, Deputy Clerk, C. C. S.

7 Case No. 206.

March, 1917. Supreme Court of Georgia.

BARBOUR

versus

STATE.

Bill of Exceptions.

Filed in office Feb. 26, 1917. W. E. Talley, D. C., S. C. Ga.

8 STATE OF GEORGIA,
County of Chatham,
City of Savannah:

And now on this 17th day of June in the year of our Lord one thousand nine hundred and sixteen comes Walter C. Hartridge, Solicitor General of the Eastern Judicial Circuit of Georgia, who prosecutes for the State of Georgia, in the City Court of Savannah, and by accusation made on oath, and in accordance with the statute in such case made and provided, in the name and behalf of the Citizens of Georgia, charges and accuses Andrew D. Barbour of the County of Chatham and State aforesaid, with the offense of a misdemeanor; for that the said Andrew D. Barbour in the County of Chatham and State of Georgia aforesaid, on the tenth day of June in the year of our Lord one thousand nine hundred and sixteen did unlawfully sell and barter, for a valuable consideration, directly and indirectly, alcoholic, spirituous and malt liquors, said alcoholic, spirituous and malt liquors being intoxicating; contrary to the laws of the said State, the good order, peace and dignity thereof.

Second Count.

And now upon the day and year aforesaid, comes the Solicitor General aforesaid, who prosecutes for the State of Georgia, in the City Court of Savannah, and by accusation made on oath and in accordance with the statutes in such cases made and provided,
9 in the name and behalf of the citizens of Georgia, charges and accuses Andrew D. Barbour of the County and State aforesaid, with the offense of a misdemeanor; for that the said Andrew D. Barbour in the County of Chatham and State of Georgia, aforesaid, on the tenth day of June in the year of our Lord, one thousand nine hundred and sixteen did unlawfully keep on hand at a place of business, to-wit: the place of business of the said defendant, Andrew D. Barbour, same being located on the —— alcoholic liquors, spirituous liquors, and malted fermented and brewed liquors, manufactured from malt, wholly and in part; contrary to the laws of the said State, the good order, peace and dignity thereof.

Third Count.

And now upon the day and year aforesaid, comes the Solicitor General aforesaid, who prosecutes for the State of Georgia, in the City Court of Savannah, and by accusation made on oath, and in accordance with the statute in such case made and provided, in the name and behalf of the citizens of Georgia, charges and accuses Andrew D. Barbour of the County of Chatham and State aforesaid, with the offense of a misdemeanor; for that the said Andrew D. Barbour in the County of Chatham and State of Georgia aforesaid, on the tenth day of June in the year of our Lord, one thousand nine hundred and sixteen did unlawfully keep for sale, alcoholic liquors, spirituous liquors, and malted, fermented and brewed liquors,
10 manufactured from malt, wholly and in part; contrary to the laws of the said State, the good order, peace and dignity thereof.

Fourth Count.

And now upon the day and year aforesaid, comes the Solicitor General aforesaid, who prosecutes for the State of Georgia, in the City Court of Savannah, and by accusation made on oath and in accordance with the statute in such case made and provided, in the name and behalf of the citizens of Georgia, charged and accuses Andrew D. Barbour of the County of Chatham and State aforesaid, with the offense of a misdemeanor; for that the said Andrew D. Barbour in the County of Chatham and State of Georgia aforesaid, on the tenth day of June, in the year of our Lord, one thousand nine hundred and sixteen, did unlawfully have in his possession at one time more than one gallon of vinous liquor; contrary to the laws of the said State, the good order, peace and dignity thereof.

Fifth Count.

And now upon the day and year aforesaid, comes the Solicitor General aforesaid, who prosecutes for the State of Georgia, in the City Court of Savannah, and by accusation made on oath, and in accordance with the statute in such case made and provided,
11 in the name and behalf of the citizens of Georgia, charges and accuses Andrew D. Barbour of the County of Chatham of Georgia aforesaid, with the offense of a misdemeanor; for that the said Andrew D. Barbour in the County of Chatham and State of Georgia aforesaid, on the tenth day of June in the year of our Lord, one thousand nine hundred and sixteen, did unlawfully have in his possession at one time more than six gallons (48 pints) of malted liquors and fermented liquors; contrary to the laws of the said State, the good order, peace and dignity thereof.

Sixth Count.

And now upon the day and year aforesaid comes the Solicitor General aforesaid, who prosecutes for the State of Georgia, in the

City Court of Savannah, and by accusation made on oath and in accordance with the statute in such case made and provided, in the name and behalf of the citizens of Georgia charged and accuses Andrew D. Barbour of the County of Chatham and State aforesaid, with the offense of a misdemeanor; for that the said Andrew D. Barbour in the County of Chatham and State of Georgia aforesaid, on the tenth day of June in the year of our Lord, one thousand nine hundred and sixteen, did unlawfully have in his possession at one time more than two quarts of spirituous liquors contrary to the laws of the said State, the good order, peace and dignity thereof.

WALTER C. HARTRIDGE,
Solicitor General of the Eastern Judicial Circuit of Georgia.

12 Endorsements on back of accusation. No. 1098. In the City Court of Savannah. State vs. Andrew D. Barbour. A misdemeanor. Accusation found this June 17th, 1916. By Walter C. Hartridge, Solicitor General, E. J. C. of Ga. H. E Harley, Prosecutor.

Witnesses for the State: H. A. Harley, P. N. Strong, Mrs. Phillip Horning, Phillip Horning, Nat Bravo, James Christie, Mrs. Nat Bravo, James A. Woods, P. M. Hendrix, Claude Frazier.

And now on this 20th day of June 1916, in open court, comes the said deft. and waives indictment or presentment by a Grand Jury, and arraignment and trial by a Petit Jury, and for plea in this his behalf says he is not guilty, and puts himself upon County. The State says he is guilty and will so prove.

C. E. DONNELLY,
ROBT. L. COLDING,
Deft's Att'y.
WALTER C. HARTRIDGE,
Solicitor General, E. J. C. of Georgia.

June 20th, 1916.

We the jury find the defendant guilty on the fourth count.

By W. B. McKINSTRY, *Foreman.*

13 Violating Prohibition Law.

STATE

VS.

ANDREW D. BARBOUR.

Sentence of the Court.

Whereupon it is considered and ordered that said defendant Andrew D. Barbour do serve 3 months in the Common Jail of Chatham County. And do pay a fine of $750.00 and costs, but if said defend-

ant fail to pay the said fine and costs it is ordered that in lieu thereof he be for the space of Twelve Months put to work and labor in the chain gang of Chatham County.

In Open Court June 20, 1916.

JNO. ROURKE, JR.,
Ex-Officio Judge City Court of Savannah.

14 Endorsement on back of sentence of court: Filed in Office June 20, 1916. Thomas S. Russell, Dept. Clerk, C. C. S.

15 In the City Court of Savannah, June Term, 1916.

STATE

VS.

A. D. BARBOUR.

Misdemeanor.

And now comes the defendant in the above stated case and moves the Court for a new trial and for grounds of motion says:

First. That said verdict is contrary to law.

Second. That said verdict is contrary to the evidence.

Wherefore he prays that these his grounds of motion for a new trial be inquired of by the Court and a new trial granted him.

CHAS. E. DONNELLY,
ROBT. L. COLDING,
Defendant's Attorney.

16 In the City Court of Savannah, June Term, 1916.

STATE

VS.

A. D. BARBOUR.

Misdemeanor.

The foregoing motion for a new trial read and considered:

Ordered that the State's counsel do show cause before me on the 15th day of July, why a motion for a new trial should not be granted as prayed.

Further ordered that if for any reason such motion is not heard and determined at the time named that same shall be heard and determined at such time as may be assigned by the Court.

Further ordered that movant have until the hearing to prepare and present for approval a brief of evidence in said case and this order do operate as a supersedeas until the further order of the Court.

In open court this 20th day of June, 1916.

JNO. ROURKE, JR.,
Ex-Officio Judge City Court of Sav'h.

17 Endorsement on back of motion for new trial. Filed in office June 20th, 1916. Thomas S. Russell, Dept. Clerk, C. C. S.

18 In the City Court of Savannah, June Term, 1916.

STATE

VS.

A. D. BARBOUR.

Amendment to Motion for New Trial.

And now comes the defendant in the above stated case and amends his motion for a new trial heretofore filed by the following additional grounds of amended motion:

Third. Because the Act of the General Assembly, upon which it is based, entitled an act to further mitigate evils of intemperance and to make more effective the laws touching the sale and keeping on hand of certain prohibited liquors and beverages; by prohibiting common carriers and their agents from shipping into this State or delivering herein, any spirituous, vinous, malted, fermented, or intoxicating liquors, where the same are intended to be received, possessed, sold or in any manner used, in violation of this or any other law of this State, and in any case except where such shipment and delivery is made in compliance with rules herein for the purpose of making clear the right of the consignee and the evidence thereof, and preserving such evidence and making the same accessible; by prohibiting any person from ordering shipments of such liquors or causing the same to be made or accepting or receiving the same, except under the rules herein stated for the purpose of mak-

19 ing clear and preserving the quantities of such liquors and the containers thereof which any individual may have, receive or possess; by entirely prohibiting certain classes of persons the receipt of possession of said liquors; by prescribing various other regulations ancillary to the principal purpose and appropriate thereto, and prescribing remedial procedure, rules of evidence and penalties, appropriate in the premises; by prohibiting any bank, individual, or corporation from presenting or collecting any draft, check or bill for the sale of such liquors, and for other purposes approved November 18, 1915, is null and void in that the General Assembly was not legally in session at the time bill was passed, it appearing from the journal of the Senate and House of Representatives that the session of the General Assembly in the year 1915 was never adiourned by the consent of both House and Senate. That the House adjourned sine die before the end of the session, without concurrence of the Senate and the Senate after the House adjourned disbanded. In consequence of which unlawful disbandment of the General Assembly, the Assembly was in contemplation of the law and Constitution in session when the Governor made his call for an

extra session and he had no authority to call an extra session before the expiration of the regular session. Said act of the General Assembly is null and void for the further reason that the Governor had no authority to call an extra session for the consideration of a prohibition law.

Fourth. Because under paragraph 13 of Section 1 of Article 5 of the Constitution, the Governor had no power to call an extra session, except (*a*) on extraordinary occasions, and (*b*) for a single object. The occasion for passing prohibition laws was not an extraordinary occasion as contemplated by the Constitution, and the object of the call was to provide appropriations for the support of the Government and State institutions, and the call for the enactment of the prohibition laws was beyond the object of the call and was nugatory and in excess of the powers vested in the Governor.

Fifth. Because the 16th Section of said described Act is repugnant to paragraph two of Section 1 of Article 1 of the Constitution of this State, in that it limits defendant's right to possess property, which was lawfully his property prior to the passage of said Act, and because it deprives him of his personal right to own, possess and enjoy property, which has been an article of property during all existence of the Government of the State of Georgia.

Sixth. Because the 16th section of said Act is repugnant to the 14th amendment of the Constitution of the United States.

1st. In that it deprives defendant of his property, without due process of law, in that it destroys his property rights in property, which he lawfully owned and possessed prior to the passage of said Act.

2nd. In that it deprives him of the equal protection of the law by making it unlawful for him to own, possess, and enjoy property, which was lawfully his before the passage of said Act, and because it makes it unlawful for him to own, possess and enjoy property, which has always been an article of property, and which is useful for the purpose of art, medicine and social enjoyment.

3rd. Because it does not appear from the accusation that the decribed liquors were brought into the State subject to May 1, 1916.

4th. Because it does not appear from the accusation or evidence that defendant became possessed of the described liquors after May 1, 1916.

ROBT. L. COLDING,
Attorney for Defendant.

In the City Court of Savannah, July Term, 1916.

STATE
vs.
A. D. BARBOUR.

A Misdemeanor.

None of the grounds set out in the amended motion is approved. Nothing set up in said grounds arose upon the trial of the case and

for that reason there is no matter set out which the Court can approve.

JNO. ROURKE, JR.,
Ex-Officio Judge of the City Court of Savannah.

In Open Court this 8th day of August, 1916.

22 Endorsement on back of amendment to motion for new trial. Filed in Office Aug. 8, 1916. Thomas S. Russell, Dept. Clerk, C. C. S.

23 *Order Refusing New Trial.*

The above motion for a new trial is hereby denied upon each and every ground thereof.

In Open Court this 8th day of August, 1916.

JOHN ROURKE, JR.,
Ex-Officio Judge, City Court of Savannah.

24 In the City Court of Savannah, May Term, 1916.

STATE

VS.

A. D. BARBOUR.

Now comes the defendant and moves the court to arrest and set aside the judgment entered in the above named case upon the following grounds, to-wit:

First. Because the Act of the General Assembly, upon which it is based, entitled an act to further mitigate evils of intemperance and to make more effective the laws touching the sale and keeping on hand of certain prohibited liquors and beverages; by prohibiting common carriers and their agents from shipping into this State or delivering herein, any spirituous, vinous, malted, fermented or intoxicating liquors, where the same are intended to be received, possessed, sold or in any manner use, in violation of this or any other law of this State, and in any case except where such shipment and delivery is made in compliance with rules herein stated for the purpose of making clear the right of the consignee and the evidence thereof, and preserving such evidence and making the same accessible; by prohibiting any person from ordering shipments of such liquors or causing the same to be made or accepting or receiving the same, except under the rules herein stated for the purpose
25 of making clear and preserving the evidence of the right of such person; by prescribing and limiting the quantities of such liquors and the containers thereof which any individual may have, receive or possess; by entirely prohibiting certain classes of persons the receipt of possession of said liquors; by prescribing

various other regulations ancillary to the principal purpose and appropriate thereto, and prescribing remedial procedure, rules and evidence and penalties, appropriate in the premises; by prohibiting any bank, individual or corporation from presenting or collecting any draft, check or bill for sale of such liquors, and for other purposes, approved November 18, 1915, is null and void in that the General Assembly was not legally in session at the time bill was passed, it appearing from the journal of the Senate and House of Representatives that the session of the General Assembly in the year 1915 was never adjourned by the consent of both House and Senate. That the House adjourned sine die before the end of the session, without occurrence of the Senate and the Senate after the House adjourned disbanded. In consequence of which unlawful disbandment of the General Assembly, the Assembly was in contemplation of the law and Constitution in Session when the Governor made his call for an extra session and he had no authority to call an extra session before the expiration of the regular session. Said act of the General Assembly is null and void for the further reason that the Governor had no authority to call an extra session for
26 the consideration of a prohibition law.

Second. Because under paragraph 13 of Section 1 of Article 5 of the Constitution, the Governor had no power to call an extra session, except (2) on extraordinary occasions, and (*b*) for a single object. The occasion for passing prohibition laws was not an extraordinary occasion as contemplated by the Constitution, and the object of the call was to provide appropriations for the support of the Government and State institutions, and the call for the enactment of the prohibition laws was beyond the object of the call and was nugatory and in excess of the powers vested in the Governor.

Third. Because the 16th Section of said described Act is repugnant to paragraph two of Section 1 of Article 1 of the Constitution of this State, in that it limits defendant's right to possess property, which was lawfully his property prior to the passage of said Act, and because it deprives him of his personal right to own, possess and enjoy property, which has been an article of property during all existence of the Government of the State of Georgia.

Fourth. Because the 16th section of said Act is repugnant to the 14th amendment of the Constitution of the United States.

1st. In that it deprives defendant of his property, without due process of law, in that it destroys his property rights in property, which he lawfully owned and possessed prior to the passage of said Act.

27 2nd. In that it deprives him of the equal protection of the *equal protection of the* law by making it unlawful for him to own, possess and enjoy property, which was lawfully his before the passage of said Act, and because it makes it unlawful for him to own, possess and enjoy property, which has always been an article of property, and which is useful for the purpose of art, medicine and social enjoyment.

3rd. Because it does not appear from the accusation that the described liquors were brought into the State subject to May 1, 1916.

4. Because it does not appear from the accusation that defendant became possessed of the described liquors after May 1, 1916.

Whereupon, defendant prays that said judgment be arrested and set aside.

ROBT. L. COLDING,
Attorney for Defendant.

Read and considered and it is ordered that the Solicitor General, who prosecutes for the State, show cause before me instanta, or so soon as counsel can be heard, why the judgment entered in said case should not be arrested and set aside.

This 8 day of Aug. 1916.

JNO. ROURKE, JR.,
Ex-Officio Judge, City Court of Sav'h.

The above motion in arrest of judgment is overruled and denied in each and every ground.

In Open Court, Aug. 8-1916.

JNO. ROURKE, JR.,
Ex-Officio Judge, C. C. S.

28 Endorsement on back of motion in arrest of judgment: Filed in Clerk's office this 24 day of June, 1916. Thomas S. Russell, Dep't Clerk, City Court of Savannah.

29 *Order Overruling Motion in Arrest of Judgment.*

The above motion in arrest of judgment is overruled and denied on each and every ground.

In Open Court August 8th, 1916.

JNO. ROURKE, JR.,
Ex-Officio Judge, City Court of Savannah.

30 In the City Court of Savannah, June Term, 1916.

THE STATE OF GEORGIA

vs.

A. D. BARBOUR.

Misdemeanor (Violating Prohibition Law). Verdict of Guilty.

Brief of Evidence.

—— HARLEY, sworn for State, testified:—

Direct examination:

I am connected with the Chatham County police force, and was on June 10, 1915, as chief of the police. I know the defendant, A. D. Barbour. I see him now, that gentleman sitting right there (pointing to defendant). It was the following day, the 11th, which is the correct date of the case, I think it was the 12th the arrest was made; I did not see him—— We found some goods, whiskey. I was not there when that was found, but they arrested a man named Mr. Horning. I was not there when the stuff was found. I visited the place afterwards. The defendant was not with me. Chapman, one of my officers, found the stuff; he is here; the stuff is up here.

(Witness here withdrawn.)

31 —— CHAPMAN, sworn for State, testified:—

Direct examination:

I am a member of the county police force, and was on the 10th day of June of the present year. I know the defendant, A. D. Barbour. I know what these sacks contain, 12 bottles of Banana brandy, I don't know whether that is an intoxicant or not, and 5 bottles Port Wine, 2 bottles Sherry wine, 6 bottles of gin, 9 bottles of Orange Bitters, and one little jug, I don't know what is in it, it has no label on it; this is the jug, there are 12 bottles of the Banana brandy and 6 bottles of this. 34 bottles of whiskey, and this jug, whatever you call this; 12 bottles of Banana brandy. I don't know that there is any whiskey that I know of, I am telling you what it is labelled, there are 2 bottles of Sherry wine. This is gin here, I guess, I would call it gin. As to stuff made in Greece, there are 6 bottles of that, what I call gin. 9 bottles of Orange bitters; 12 bottles of Banana cordial; 7 bottles of sherry and port; that is all. I found this stuff just outside of the gate of the garden of Phillips Hornings', 12 miles out on the Ogeechee road; that is in Chatham County, State of Georgia; it was in Phillip Horning's garden, within the inclosure, buried in the ground in one barrel; it contained all of it. Horning was there when I found it, also Patrolman Hendrix, Lieut. Woods of the city police force, and Lieut. Strong and my-

self of the county police force, and Horning. The defendant, Barbour, was not there. I have seen these before—came from
32 out at that place, lots of it there, in the barn on Horning's place, about 100 feet from where the liquor was buried; lots of pieces of wood like these, somewhere between 20 and 30 boxes; the tops were broken off, the boxes were there; that is from the top, found in his barn.

Cross-examination:

As to how come me to go out there Lieut. Woods came along and told me he had information that there was whiskey out there. Mr. Browboy did not tell me.

Redirect examination:

I never drink any, I could not tell you an intoxicant when I taste it, never drank in my life.

Recross-examination:

Of my own knowledge I don't know whether it is intoxicat*ion* or not, and I don't care to find out.

T. F. McKay, sworn for State, testified:—

Direct examination:

This has a good "kick" to it (witness tasting contents of one of the bottles testified to by witness Chapman) *I* it has alcohol in it, enough to knock you out, to intoxicate you. I would not select that as a drink, it is some sort of Greek stuff. This here has got
33 some alcohol in it (tasting contents of another bottle). I don't think you can drink enough of this to intoxicate you. This in the jug (tasting contents) has alcohol in it, plenty of it; it is kind of a wine.

Cross-examination:

I would not say I am an expert on intoxicants. I can tell which has a light "kick" and a violent "kick" and no "kick." I have seen this stuff before with this Greek lettering on the outside, but have not drank any. I am prepared to swear that will intoxicate.

Phillip Horning, sworn for State, testified:—

Direct examination:

I have got a place out on the Ogeechee road, 12½ miles from town. I know Mr. Harley, of the county police force, and Lieut. Woods of the city police force, and Mr. Strong of the county force and Mr. Chapman, I remember the day they came out there to my garden and dug up some stuff at my place, on the 11th of the month. I buried that stuff there, Mr. Barbour there, Mr. A. D.

Barbour, and Mr. Jim Christy on the 3rd of this month—and I was going off to work on the 4th of the month up to Mr. Fawcett's to work and Mr. Barbour told me to take this stuff and put it in my room. The stuff was put up in boxes, I think about 20 or 22 boxes of them. We counted them and—some of them had wood like that, that is some of the wood that came off the boxes, and Mr. Barbour said: "you put this stuff in your room." He
34 came out there at 2 o'clock at night in an automobile and I took the stuff the next morning. I was going off to work and I told my wife, "I don't want to put that stuff in my house, I don't want it here" and I put it in the yard and put some dirt on it; it was in some boxes and I opened some of them and filled up the barrel full, went to work on that evening, Sunday, the 4th, and I said "you tell Mr. Barbour or Jim, if he comes out, show them where this stuff is and tell them to take it away"; I did not see them there on the 7th because I was not there, the barrel was disturned from the way I left it. This stuff here was buried there; there was lots more than has been brought up here, they were hauling it off from there for very near a month back to Savannah, they would go out there in machine and get it and bring it to Savannah, I would see them put it in suit cases. I do not know what kind of stuff it was they put in suit-cases, I had not paid any attention, it was liquor of some kind, I don't know what kind. I know beer when I see it; no beer there. I know whiskey when I see it, it is something like that, it came with papers around it and they would put it in suit-cases with the paper on, you could not see the label. First one would go there and then another; Barbour went out there on the 3rd of the month, Saturday, 2 a. m. and got 2 satche-s full and a sack full. Mr. Barbour toted the sack full to my gate himself. The stuff was brought to my place on the 16th of May. That is the time they brought it out; I put it in the old barn. The defendant was not there when it was brought out. I have seen
35 this party (one Fraser) before, he was out there, he drove the machine out there, he brought this stuff; he drove an automobile, he had this stuff, hauled this stuff out there.

Cross-examination:

He is the man who brought the stuff out there, and this gentleman here and Peter Carellas. Mr. Browboy was the first man who came there after some of this stuff. I did not take any of this stuff, he did not tell me I did. This stuff was not all carried out there before the first of May; Mr. Barbour did not undertake to move it before the 1st of May: My wife showed Mr. Barbour where this stuff was. This is all the stuff that the police got; no more there that they did not get. I just took it and put it into the barrel. Mr. Barbour told me himself to do as I see fit, "If you think anybody will find this thing, do as you see fit with it; another thing, if you are caught with it, you come on to jail and call up Mr. Christy and I will have my lawyer to plead your case, and whatever the fine is, I will pay

it." So when I came to Mr. Harley's office I called up Jim and in a few minutes he came down and he said——

Redirect examination:

Mr. Barbour told me he would get me a lawyer if anything happened.

36 —— Fraser, sworn for State, testified:—

Direct examination:

I refuse to make a statement at all about this case. I understand section 23, page 103, of the Act which you have just read, also section 15, page 85. I drive a machine, automobile. I was following that occupation on the 16th of May, have been driving for the last 7 years. I know Mr. Horning, who has just left the stand. As to whether or not I saw him on that date, 16th of May, I refused to make any further answer in court. I have heard you read this Act, and I refuse to answer any question.

To the Court: I do not want to answer because it may incriminate me.

Direct examination resumed:

As to whether or not this is the Mr. Horning about whom you spoke, and whether or not I saw him on the 16th, I don't want to answer the question, I have seen him lots of times. I don't recollect seeing him at all on the 16th of May of the present year. I know where his place is out on the Ogeechee road.

To the Court: No one at all has advised me not to answer these questions.

Direct examination resumed:

I know where Mr. Horning's place is out on the Ogeechee road. As to whether or not I was there either in the day time or night time on the 16th of May of the present year, I don't care to answer any question about it.

37 —— Browdoy, sworn for State, testified:—

Direct examination:

I know Mr. A. D. Barbour and Mr. Phillip Horning. I know where Mr. Horning lives out on the Ogeechee road. It was the Wednesday morning after the 16th of May, this year, that I was at his place, it was the night hours though; Claude Fraser was with me, the man who has just left the stand; this is the man I call Claude Fraser (pointing to Fraser, who has just left stand). He was chauffe-r; Peter Carellas, Jimmie Christy and Mr. Andrew D. Barbour were also with me. Our purpose in going out there was to carry out some whiskey and goods in whiskey line; we carried out 20 or 22 cases of whiskey; anywhere from one dozen I suppose to 2 dozen bottles to a case,

quarts and pints, mixed up. We got that whiskey and stuff on the corner of Tatnall and Jones Street, southeast corner; that is a residence; whose residence it is I could not say; on May 16th the defendant, A. D. Barbour, ran a restaurant on West Broad Street, in front of the Union Depot, in Savannah. Before the 1st of May, of the present year, he ran a saloon and a restaurant, same place. Mr. Barbour and Mr. Christy came to my house on the 16th, I suppose must have been between 11:30 and 12 o'clock, and Mr. Christy called me. I got up and he said, "Nat, put on your coat." I said, "what is the matter". He said, "get your coat on". I said, "what is the trouble"?

38 I stepped off the stoop—At that time *was* place was 463 Montgomery Street, between Gaston and—3 doors from Gaston anyhow, and I went outside and Mr. Barbour told me, "I am in trouble, Nat, I have got some cases, about 20 cases and want to get them out of town, have you not got a place I can put them"? I said, "no, I have not." I said, "you may be able to put them at Phillip Horning's", and Jim Christy said, "yes, that is the very idea". I mentioned Horning's and said, "probably, you may be able to put them at Phillip Horning's." Christy was working for Mr. Barbour then; so I went on back in the house and got my coat and hat and went around to Mr. Barbour's place and I suppose it must have been about 2 o'clock when we went around on Jones and Tattnall Street and got this whiskey and carried it out. We gave it to Phillip Horning out there; he is the one who testified here this morning, we put it in his corn house. Barbour was not with us, Mr. Barbour did not get that far, he got about half way on the second trip and gasoline gave out; we made two trips; he did not go on the first trip he came with us on the second trip, but the gasoline gave out.

Cross-examination:

It was on a Tuesday night when Mr. Barbour came to my house. That is the date as well as—I know that was the date because I could tell the date of the month. I was home on the 15th of May. I could not tell you what I did on the 10th of May. I was not working on

39 the 5th of May. I was home then. It was months and months before then when I was last at Mr. Horning's, I really could not tell you how many months. I fix this date as May 16th because I remember it was May 16th, I just remember it because I was working for Mr. Barbour and I traced the time back. I worked for him after that time, I worked for Mr. Barbour about 8½ days right after that, right after we carried the whiskey out two days afterwards, doing carpenter work. I did not go out and get some of this stuff myself and peddle it, sell it myself. I know Mr. Lloyd; I did not tell him I had some I would like to sell him. I did not see him go into Mr. Barbour's place and try to buy whiskey and he was told he could not get it and I told him I would sell him some. I took some cock-tail from that stuff with Mr. Barbour's permission, two bottles. I don't see any cocktail here now, I don't really know what became of the balance of that cocktail. I don't know Mr. Barbour tried to move all that stuff away from there for the purpose of destroying it; I don't know this stuff was taken out of cases and put

in a barrel and the barrel buried. The stuff was taken out in cases, I don't know anything about it being put in a barrel and buried. I did not tell him to put that stuff out there. I have been prosecuted myself for violating the prohibition law. Since the 1st of May I mean to tell you I have not peddled whiskey around Union station. I am Mr. Horning's brother-in-law.

Q. Did you not go out there before this raid with somebody,
40 either your wife or daughter?

A. Yes.

That is the very night I got the stuff I told you I got. I did not want to get more of it and they refused to give it to me,—yes, sir, one way, Sunday night two weeks ago——. My mother-in-law was at the house very sick, and Dr. Norton prescribed whiskey for her and she was very low and asked me to go out and let her sons and daughters know she was very sick——. I have asked Mr. Horning's wife to give me some whiskey, and she refused to give it to me. I did not then come to town and report this whole thing. I am not the man who reported this to the police.

Redirect examination:

Mr. Barbour's nationality is by birth Italian I suppose, or Greek, I don't know which.

—— HARLEY, recalled for State, testified:—

Direct examination:

I have understood Mr. Barbour was a Greek by birth.

J. A. WOODS, sworn for State, testified:—

Direct examination:

I am connected with the Savannah Police department as Lieutenant of police. This case came to the county police through me. Mr. Nat Browboy had nothing to do with making this case, I never saw him before to know him.

41 Cross-examination:

I have searched Mr. Barbour's place on*t* time before.

State introduces in evidence, without objection, the stuff which the witness Chapman has testified about and the pieces of board mentioned in the testimony.

Statement of Defendant.

I would like to read my statement. Gentlemen of the Jury, I am charged with violating the prohibition law of the State, and I am not guilty. As you probably know, I was not born in this country

and cannot tell you all the points in this case, and as my lawyer is not allowed to ask me a question, with his assistance I have prepared a statement, giving a statement of the entire matter. Before the 1st of May I had a quantity on hand, and this man Nat Browboy came to me and told me he would come and take care of it, had the stuff hauled to his brother-in-law's place, Mr. Horning. After this I decided to move the stuff from there and on going out I found that 10 cases had been stolen, there were 24 cases altogether; still later this barrel of stuff was found in Mr. Horning's place. Now, I don't know if these goods were ever belonging to me—all the goods hauled out were in cases, and either the goods in barrel were stolen from me, or never belonged to me. I did not know there was any liquor in Mr. Horning's place at the time of the raid, because I thought they
42 stole the balance and did not think there was any more. After this man Browboy came to town and was selling whiskey and offered to sell some to Mr. Ed Lloyd. If the Solicitor General don't believe this, Lloyd is outside, and if you will put him on the stand, he will tell you that Browboy tried to sell him some. The night Mr. Browboy was caught with the stuff, Mr. Smith, who lived near Horning's place, he will tell you that Browboy came to Horning's place and wanted to get some stuff, accompanied by a woman they call Miss Mary, I don't know whether she was his daughter or wife, But Mr. Smith can tell you this. Mrs. Horning would not let him have the stuff, and to get even with her he came to town and reported they had the stuff out there; the police told me so, mentioning Browboy's name, he was the one who reported it, and in order to put the blame on me, Horning said it belonged to me. Browboy said that Horning had been taking some of the stuff and Horning said and said Browboy had been taking it, they are brother-in-laws. They have tried to make three cases against me, but I was discharged and no case made, as they could not find any evidence that I was violating any law, and I was not guilty. When my place was searched the last time right after the two original packages were found in my two clerks' bed-rooms, showing they had ordered the stuff from Jacksonville, and I did not have any. If you don't believe this, the detectives will tell you, Mr. Woods will admit that this is the truth. Then the 10th or 11th I ordered from Alexander,
43 Jacksonville, Florida, two quarts of whiskey, and it was in the Express Company when this raid was made. I think my lawyer has it on the desk, a ticket over there showing it. No whiskey was ever found in my residence or place of business, and I am not guilty of violating the prohibition laws of this State.

Defense Rests.

Approved and Ordered filed This July 22nd, 1916.

JNO. ROURKE, JR.,
Ex-Of. Judge City Ct., Sav'h.

44 Endorsement on back of brief of evidence: Filed in Clerk's Office, July 29th, 1916. Thomas D. Russell, Dept. Clerk, C. C. S.

45 In the City Court of Savannah, June Term, 1916.

THE STATE OF GEORGIA

vs.

A. D. BARBOUR.

Misdemeanor (Violating Prohibition Laws). Verdict of Guilty.

Charge of the Court.

Gentlemen of the Jury:

The defendant in the case at bar is accused of violating the prohibition law, the material averments being contained in the accusation, which you will take with you to your jury room, and to which you are now referred. To that accusation the defendant has entered a plea of not guilty, and that plea puts in issue every material allegation in the accusation, as well as the defendant's guilt thereunder. There are five counts in the accusation, the fifth count being eliminated from your consideration, count No. 5. The term "prohibited liquors and beverages" used in the Act of the *Act of the* General Assembly enacted at the extraordinary session of the legislature in 1915 shall include and be deemed to embrace the following: Alcohol, alcoholic liquors, spirituous, liquors, and all mixed liquors, any part of which is spirituous, foreign or domestic spirits, or rectified or distilled spirits, absinthe, whiskey, brandy, rum and gin. Any
46 drinks, liquors or beverages containing one-half of one per cent of alcohol or more by volume at 60 degrees Fahrenheit; or any other liquids or liquors manufactured or sold, or otherwise disposed of, for beverage purposes, containing said amount of one-half of one per cent of alcohol or more. Any intoxicating bitters or beverages by whatever name called.

I charge you that it is unlawful for any person, firm, association, or persons or corporation to manufacture, sell, offer for sale, keep for sale, barter, furnish at a public place, keep on hand at a place of business or at or in any social, fraternal or locker club, or otherwise dispose of any of the prohibited liquors and beverages just defined to you in any quantity whatever. I charge you that the keeping of liquors or beverages or any of them, just defined to you in any building not exclusively used for a dwelling shall be prima facie evidence that they are kept for sale, or with intent to dispose of the same contrary to law.

The first, second and third counts of the accusation are based upon the law just read to you.

The fourth and sixth counts of the accusation are based upon the following law: It shall be unlawful for any person, to receive, accept delivery of, possess or have in possession at one time, or within any period of thirty consecutive days, whether in one or more places, or whether in original packages or otherwise, more than one gallon of

vinous liquors, or more than two quarts of spirituous liquors or any intoxicating liquors, or other prohibited liquors beyond those defined to you.

47 I charge you that the language of the statute means, that it is unlawful to possess more than one of the two beverages, or one in excess of the quantity defined to you as aforesaid. I charge you that the following facts shall constitute prima facie evidence that the liquors just defined to you are kept for sale contrary to law: Possession at one time or within a period of thirty days or more, of more than one gallon of vinous liquors, whether in one or more places, or more than two quarts of spirituous liquors. In regard to the rule as to prima facie evidence, I charge you that the same shall be sufficient to change the onus or burden of proof on the defendant in any such case, the usual rule of law being that the burden is upon the State to prove the defendant's guilt beyond a reasonable doubt as to direct evidence, and beyond every other hypothesis save that of the guilt of the accused as to circumstantial evidence but under the rule of prima facie evidence, the burden is on the defendant to show to your satisfaction that he is not guilty, so if you find that the defendant had in his possession an amount of liquor as defined to you in excess of the amount allowed by law, then prima facie he would be guilty of a violation of law against the sale of spirituous and intoxicating liquors, and the onus would be upon him to get rid of that prima facie presumption. If you believe he has carried that burden successfully, then you should disregard the evidence and the rule, but if he has not carried it successfully, then the prima facie rule or evidence still exists and it would be

48 your duty to convict him.

As to the count of the accusation charging sale and keeping liquor on hand at a place of business, I charge you that the law of Georgia makes it unlawful to sell or barter for a valuable consideration, either directly or indirectly, any alcoholic, spirituous, malt or intoxicating liquors, or intoxicating bitters, or other drinks, which if drunk to excess will produce intoxication. To keep on hand at one's place of business any such liquors as defined to you concerns one of the counts of the accusation.

Under the term "alcoholic or spirituous liquors" are included such liquors as contain a sufficient quantity of alcohol as to produce intoxication if drunk to excess on any given occasion. The liquor or liquors referred to in the law are such as are intended for beverages, and liquors which cannot be so used do not come within the scope of the law. Whiskey, brandy, rum, gin, lage- beer, alcohol, stout, ale and porter are such liquors and of this judicial cognizance is taken without proof, it not being necessary under the law for the State to prove the intoxicating qualities of the liquors just defined to you.

A place of business means a public place of business where the public generally are expressly or impliedly invited for the purpose of transacting business with the proprietor, a place where people congregate or go for the purpose of trade or traffic, or some sort of mercantile transaction; a place of business includes not only the

49 main place or room or place of business in which the business is actually conducted, but also includes any near-by house or

any place owned or used by the proprietor of the business, or in such relationship to the actual place as to make such place or house a convenient one which the proprietor would probably use for keeping such liquor as he might intend for unlawful sale under the cover of the business carried on in the main place.

I charge you that under the first count of the accusation and under the second count of the accusation that you would have to exclude every other reasonable hypothesis save that of the guilt of the accused, the evidence on the first and second counts being of a circumstantial nature, and this rule applies. Indirect or circumstantial evidence is that which only tends to establish the issue by proof of various facts sustaining by their consistency the hypothesis claimed. To warrant a conviction on circumstantial evidence, the proven facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused. When entirely circumstantial the evidence should connect the defendant with the criminal act.

I charge you in connection with the proposition advanced as to the liquors being kept at the place of another person, that in misdemeanors all are principals. All who procure, command, aid or abet the commission of a misdemeanor are regarded by the law as
50 principal offenders. All who knowingly participate in criminal transactions are in misdemeanor cases equally guilty, whether they participate as agent or principal actor, whether as partner, or as a mere accessory, in the broader sense of the word, whether on their own behalf, or as an employe or as an agent of another; all would be equally guilty under the law.

Every person accused of crime is presumed by law to be innocent until guilt is proven beyond a reasonable doubt. The reasonable doubt of the law is one that grows out of the testimony, or the lack of testimony; it is not an artificial or capricious doubt, but the doubt should be real and honestly and fairly entertained, after all reasonable efforts to find out the facts. In all criminal trials the defendant shall have the right to make to the court and jury such statement in his behalf as he may deem proper. It shall not be under oath, and shall have only such weight as the jury may see fit to give it. They may believe it in preference to the sworn testimony in the case, if they so desire, provided they believe it to be true. The true question in criminal cases is not whether conclusion at which the testomony points may be false, but whether there is sufficient testimony to satisfy the mind and conscience of the jury beyond the doubt defined to you. In civil cases a preponderance of the testimony is considered sufficient to produce mental conviction, while in criminal cases a greater strength of mental conviction is held necessary to
51 justify a verdict of guilty. On the trial of all criminal cases, the jury are the judges of the law and facts; they are the exclusive judges of the facts; they take the law from the court and the testimony from the witnesses, and if they so desire, from the prisoner's statement, and apply one to the other and find their verdict accordingly.

Keeping in mind the law I have given you in charge, you will

determine from what you have heard from the witness stand whether the charge upon which the State relies in this accusation has been established beyond a reasonable doubt as to counts as to which there is direct evidence, if any, and the principles given you as to circumstantial evidence, that is, excluding every other reasonable hypothesis save that of the guilt of the accused. If you are satisfied under these principles of law given you in charge that the defendant is guilty, it is your duty to find him guilty. If you are not so satisfied, it is equally your duty to find the defendant not guilty. There being five counts remaining in the accusation, in the event you should find the defendant guilty on all five counts, the form of your verdict will be, we, the jury, find the defendant guilty, which would mean he would be found guilty on five counts. If you find the defendant guilty, but find him guilty upon a lesser number of counts than the five counts, you would specify upon what counts,
52 if any, you find him guilty, eliminating the fifth count; so you will note by your verdict if he is guilty on any count or counts, eliminating the fifth. In the event you find the defendant not guilty, the form of your verdict will be, we, the jury, find the defendant not guilty.

You may retire.

Approved and ordered Filed this August 8th, 1916.

JNO. ROURKE, JR.,
Ex-Of- Judge City C't, Sav'h.

53 Endorsement on back of charge of court: Filed in Clerk's Office, August 8th, 1916. Thomas S. Russell, Dept. Clerk, C. C., S.

54 In the Court of Appeals of Georgia, March Term, 1916.

A. D. BARBOUR, Plaintiff in Error,

vs.

STATE OF GEORGIA, Defendant in Error.

Personally appeared before me, a duly authorized and commissioned Notary Public in and for the County of Chatham and State of Georgia, A. D. Barbour, who being duly sworn, deposes and swears that he is the plaintiff in error in the above stated case; that his counsel has advised him and he doth verily believe that he has a good cause for writ of error to the Court of Appeals of Georgia and that owing to his poverty he is unable to pay the costs in such case made and provided.

A. D. BARBOUR.

Sworn to and subscribed before me this 19th day of August, 1916.

THOS. F. DAY,
Notary Public, Chatham County, Georgia.

Pauper Affidavit, Filed in Office this August 21, 1916. Thomas S. Russell, Deputy Clerk C. C., S.

55 In the City Court of Savannah.

I, Thomas S. Russell, Deputy Clerk of the City Court of Savannah do hereby certify that the within and foregoing constitutes a true transcript of such parts of the record in the case of Andrew D. Barbour, Plaintiff in Error vs. The State of Georgia, Defendant in Error, as are named in the Bill of Exceptions, Filed in the Clerk's Office of the City Court of Savannah, August 21st, 1916.

I do further certify that the July Term of the City Court of Savannah commenced its session on July 3rd, 1916, and that the same is still in session as appears from the minutes of the said Court.

In Witness Whereof I have hereunto set my official signature and affixed the Seal of the City Court of Savannah, at Savannah, Georgia, this August 25th, 1916.

THOMAS S. RUSSELL,
Deputy Clerk, City Court of Savannah.

56 Case No. 206.

Supreme Court of Georgia, March Term, 1917.

BARBOUR

versus

STATE.

Transcript of Record.

Filed in Office Feb. 26, 1917. W. E. Talley, D. C., S. C., Ga.

57 No. 206.

Supreme Court of Georgia.

ATLANTA, April 10, 1917.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

A. D. BARBOUR

v.

THE STATE.

This case came before this court upon a writ of error from the city court of Savannah; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

All the Justices concur, except Fish, C. J., and Atkinson, J., dissenting.

Bill of costs, $10.00.

58 No. 206.

BARBOUR

v.

THE STATE.

By the Court:

1. Intoxicating liquors being subject to the police power of a State, even when such liquors are acquired legally they are taken with their inherent infirmities, and subject to such legislation as the State may enact under its police power. The legislation, as an incident to the main purpose, may impair the property value of the liquor or destroy it altogether, when such incidental result is necessary to the main purpose and enforcement of the law. The act of the General Assembly which forbids the possession of more than a specified amount of intoxicating liquor at one time applies alike to that which was acquired before and after May 1, 1916, and is not unconstitutional for any of the reasons assigned.

2. Grounds of a motion for a new trial not approved by the trial judge can not be considered. The evidence warranted the verdict.

59 Andrew D. Barbour was convicted in the city court of Savannah on an accusation charging him with a violation of the prohibition law. The accusation contained six counts. The defendant was found guilty on the fourth count. He filed a motion for a new trial, and a motion in arrest of judgment. Both motions were overruled, and he excepted. The fourth count charged him with having in his possession at one time more than one gallon of vinous liquor.

GILBERT, *J.* (after stating the foregoing facts):

1. Among the provisions of the prohibition law enacted at the extraordinary session of the General Assembly in 1915 which became effective on May 1, 1916, was that which forbids any person to have in his possession at any one time more than one gallon of vinous liquors. It was for a violation of this provision of the law that the plaintiff in error was sentenced. He insists that he possessed the wine prior to May 1; that, having acquired the wine when it was lawful to do so, and before his property rights were affected by the law, his possession was not a violation of the act; and that to consider the law as applying to liquor in possession before the law became effective would be to give to it a construction repugnant to the constitution of Georgia (Civil Code, § 6358) and to the fourteenth amendment of the constitution of the United States.

60 That this contention is unsound we entertain no shadow of a doubt. Intoxicating liquors are peculiarly, beyond all cavil, the subject of police power of the State, and their inherent evil qualities are so well recognized as to form an unquestioned basis for such

exercise of power. We will, therefore, not consume space for the citation of authorities on this point. The exercise of this power by legislatures, as well as the adjudications of the courts, has been progressive toward the complete outlawing of intoxicating liquors. The present nearly harmonious view of the question did not always prevail. There was a time when many things now forbidden by law, because harmful to the public morals, were permitted to flourish without let or hinderance. Lotteries, bucket-shops and numerous other activities, as well as bar-rooms, were considered legitimate. Few will now be found to defend any of these. The dangerous character of alcoholic liquors is universally recognized by the courts. The fact that it is an article fraught with such dangerous perils to the morals, good order, health and safety of the people places it upon a different plane from that of other kinds of business. It is well settled that in legislating in behalf of the public morals, health and safety, the State by reason of its police power may enact laws which incidentally impair property values [Mugler v. Kansas, 123 U. S. 623 (8 Sup. Ct. 273, 31 L. ed. 205)], or destroy them altogether. Cureton v. State, 135 Ga. 660 (70 S. E. 332, 49 L. R. A. (N. S.) 182); Southern Ex. Co. v. Whittle, 194 Ala. 406 (69 So. 652); Glenn v. So. Ex. Co., 170 N. C. 286 (87 S. E. 136);
61 Preston v. Drew, 33 Me. 558 (54 Am. D. 639); Patsone v. Pennsylvania, 232 U. S. 138 (34 Sup. Ct. 281, 58 L. ed. 539); Silz v. Hesterberg, 211 U. S. 31 (29 Sup. Ct. 10, 53 L. ed. 75); It is true that the constitution declares: "protection to person and property is the paramount duty of government," but it should be noted that protection to person comes first, and also that in the very first article of the bill of rights it is written, "all government * * * is instituted solely for the good of the whole."

The police power of the states touching the health, morals, property, peace, good order, and dignity of the people is essential to the existence and prosperity of the States; and this power has never been delegated to the Federal government, nor restrained by the constitution of the United States. Barbier v. Connolly, 113 U. S. 27 (5 Sup. Ct. 357, 28 L. ed. 923); In re Rahrer, 140 U. S. 545 (11 Sup. Ct. 865, 35 L. ed. 572); United States v. Knight Co., 156 U. S. 1 (15 Sup. Ct. 249, 39 L. ed. 325).

The impairment of property value or destruction is not the primary object, but is permitted because it is a necessary incident to the main purpose. Intoxicating liquors being subject to the police power of the State, they are, even when lawfully acquired, taken with their inherent infirmities, and subject to such legislation as may thereafter be enacted within the police powers of the State. "The ultimate purpose and end of prohibition is to prevent the use of liquor as a beverage. This ultimate end is approached step
62 by step, and when the preponderent and prevailing morality of the nation believes that the public welfare demands the final step, the way will be found to accomplish the end." State v. Phillips, 109 Miss. 22 (61 So. 651). As a means of preventing the use of liquor as a beverage the State has the power, it is universally

admitted, to prohibit traffic in intoxicating liquors, and this power would be futile unless there was also full power to make it effective. Since the State has the power to prohibit the manufacture and sale, it also has the power, as an incident to the right, to restrain the means by which intoxicating liquors for personal use can be obtained. Clark Distilling Co. v. Western Md. Ry. Co., 242 U. S. 311, 320 (37 Sup. Ct. 180, 61 L. ed.) It follows as an irresistible conclusion, that likewise the State may constitutionally prohibit the possession of intoxicating liquors, as an incident to the main purpose.

The act in question became effective many months after its passage and approval by the Governor. Notwithstanding this fact, it is insisted that its provisions do not apply to liquors in possession at the time it became effective. If this were true, the beneficent effects of the legislation would be a negligible quantity. If intoxicating liquors in possession of persons in Georgia at the time were not affected by the law, surely, such liquor stored in other States,
but owned by citizens of Georgia, would not be affected. To
63 follow this reasoning would lead us to the inevitable result
that no liquor in existence prior to May 1, 1916, upon the inhabited globe would be affected by the legislation, and hence, if found in possession after May 1, 1916, such possession would not be made illegal by the act. It requires no argument to those who are at all familiar with the ingenuity of those who desire to traffic in intoxicating liquors, to demonstrate that under such a construction the most stringent prohibition laws conceivable would become a matter of jest. Dealers in alcoholic liquors have never been known to be over-nice and delicate in adhering to the strict letter of the law. For the reasons above stated the State may not only limit the quantity of liquor a person may possess, but it may forbid him to possess any at all, whether acquired before the law became effective, or afterward, this power being a necessary incident to the main purpose of the legislation, and to the enforcement of the law. All provisions of this law are incidental to the main purpose. Ownership and property rights are distinct from the matter of possession. But neither ownership, nor property rights, nor possession will be permitted to hinder the operation of laws enacted for the public welfare. Man possesses no right under the laws or constitutions, State or Federal which is not subservient to the public welfare. The public, through its proper channels, may commandeer a proportion of his property or his income for the support of the government. At his death it may subject to the public use a portion of his estate; and when necessary for the public defense
in times of war, it may conscript such citizens as are re-
64 quired and expend their very life blood that the State may
live. Under the police power it may slaughter diseased cattle; it may destroy unwholesome food; it may compel vaccination; it may confine the insane or those afflicted with contagious disease; suppress obscene publications and houses of ill-fame (Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. ed. 385), and require sanitary conditions in the homes and premises of citizens

even against their will. It would be preposterous then to deny the power of the State to forbid the possession by its citizens of that which is destructive of the public welfare, or its right to destroy entirely such baneful products when necessary to protect the morals, the health, and the safety of the public. As was said by Chief Justice Shaw in Commonwealth v. Alger, 7 Cush. (61 Mass.) 53, "All property in this commonwealth is held subject to those general regulations which are necessary to the common good and general welfare." In Reg. v. Vine, L. R. 10 Q. B. 195, where the question was whether the enactment that "every person convicted of felony shall forever be disqualified from selling spirits by retail" affected a person convicted of felony before the passage of the act, Cockburn, C. J., speaking for the court, said that it did affect him, and rendered his license void. Every member of society impliedly assents that his own individual welfare, his property, his liberty, and his life shall yield to the welfare of the community, and, if necessary, shall be sacrificed to the public good. Salus populi
65 suprema lex. We hold, therefore, that the law is not retroactive, nor is it repugnant to the constitution of Georgia, nor to the constitution of the United States for any of the reasons assigned. Delaney v. Plunkett, 146 Ga. 547 (91 S. E. 561).

2. All other assignments of error have been decided adversely to the contentions of the plaintiff in error in Delaney v. Plunkett, supra, and in Bunger v. State, postea. The evidence authorized the verdict. The cases of Padgett v. Sturgis, 6 Ga. App. 544 (65 S. E. 352), and Fears v. State, 102 Ga. 274 (29 S. E. 463), are not applicable to the facts of this case, since both of these cases were decided prior to any legislation in this State limiting the quantity of intoxicating liquors that one may lawfully possess. The court having declined to approve any of the grounds of the amended motion for a new trial, they cannot be considered. Dickens v. State, 137 Ga. 523 (73 S. E. 826). The evidence warranted the verdict.

Judgment affirmed. All the Justices concur, except——

66 FISH, *C. J.*, and ATKINSON, *J.*, dissenting:

For reasons stated in the dissenting opinion in the case of Delaney v. Plunkett, 146 Ga. 547 (91 S. E., 561), so much of section 16 of the act approved November 18, 1915 (Acts 1915, Ex. Sess. p. 90), as purports to inhibit the keeping on hand liquors owned and possessed in this State, which were lawfully so owned and possessed prior to the first day of May, 1916, is violative of those provisions of the State and Federal constitutions, which guarantee the right of private property and immunity from retroactive laws.

This case does not involve the constitutionality of section 20 of the act approved November 17, 1915.

This dissent does not apply to the ruling announced in the second headnote.

67 UNITED STATES OF AMERICA, *ss:*

[Seal U. S. District Court, N. D. Georgia.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Georgia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Andrew D. Barbour, Plaintiff in Error, and The State of Georgia, Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution,
68 or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Andrew D. Barbour as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 27th day of April, in the year of our Lord one thousand nine hundred and seventeen.

[Seal U. S. District Court, N. D. Georgia.]

OLIN C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

Allowed by

WM. H. FISH,
Chief Justice of the
Supreme Court of Georgia.

Due and legal service of the foregoing writ of error acknowledged, all other said further service waived.

This April 27th, 1917.

CLIFFORD WALKER,
Att'y Gen.,
By M. C. BENNETT,
Ass't Att'y Gen.

Filed in office Apl. 27, 1917. Z. D. Harrison, C. S. C. Ga.

69 UNITED STATES OF AMERICA:

To the State of Georgia:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Georgia, wherein Andrew D. Barbour is plaintiff in error and you are defendant in Error, to show cause if any there be why the writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William H. Fish, Chief Justice of the Supreme Court of the State of Georgia this 27th day of April in the year of our Lord One Thousand Nine Hundred and Seventeen.

WM. H. FISH,
Chief Justice of the Supreme Court of Georgia.

Service acknowledged and copy received of the within and foregoing citation.
This 27 day of April 1917.

WALTER C. HARTRIDGE,
Solicitor General for the State of Georgia.

CLIFFORD WALKER,
Att'y Gen.,
By M. C. BENNET,
Ass't Att'y Gen.

Filed in office Apl. 27, 1917. Z. D. Harrison, C. S. C. Ga.

70 In the Supreme Court of the State of Georgia.

ANDREW D. BARBOUR, Plaintiff in Error,

vs.

THE STATE OF GEORGIA, Defendant in Error.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of Georgia.

The petition of Andrew D. Barbour respectfully shows:

1. Andrew D. Barbour petitioner herein was charged in the City Court of Savannah on June 17th, 1915, with violating the prohibition laws of the State of Georgia, by unlawfully having in his possession at one time more than one gallon of vinous liquor contrary to the laws of the said State, the good order, peace and dignity thereof, said prosecution being made upon an accusation or information presented by Walter C. Hartridge, Solicitor General of the Eastern Judicial Circuit of Georgia who prosecutes for the State.

2. Andrew D. Barbour petitioner was prosecuted under the Act of the General Assembly of the State of Georgia approved in November 1915, and which became effective May 1st 1916.

3. Andrew D. Barbour petitioner herein and plaintiff in error made the defense that the liquor- in his possession were purchased and owned by him prior to the passage of said act and prior to the effective date of said act and that said act of the General Assembly was repugnant to the Fourteenth Amendment of the Constitution of the United States in that they made it unlawful for him to have
71 in his possession property which he lawfully acquired and which it was lawful for him to acquire, own and possess prior to the passage of said Act and prior to the effective date of said Act. The jury empanneled to try petitioner under the rulings and instructions of the said City Court of Savannah returned a verdict finding petitioner, Andrew D. Barbour guilty, whereupon he was sentenced by the Court.

4. Petitioner filed a motion in arrest of judgment which motion was overruled by the Judge of the City Court of Savannah.

5. Petitioner filed a motion for new trial in said cause which motion was overruled. To the final judgment of the City Court of Savannah petitioner then and there excepted and sued out a writ of error to the Court of Appeals of the State of Georgia, assigning error upon the judgment of the Court overruling his motion for new trial and his motion in arrest of judgment.

6. Pending the decision of said case by the Court of Appeals of the State of Georgia the Constitution of the State of Georgia was amended so that the Supreme Court of the State of Georgia was given jurisdiction thereof instead of the Court of Appeals of the State of Georgia.

7. The case having come on to be heard before the Supreme Court of the State of Georgia said Court rendered a judgment affirming the

judgment of the City Court of Savannah which judgment was
72 entered by the Supreme Court on the 10th day of April 1917.

8. In this suit there was drawn in question the validity of said certain statute of the State of Georgia, and an authority exercised under said State on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of their validity; and the title, right, privilege or immunity is claimed under the Constitution of the United States, and the decision is against the title, right, privilege or immunity set up or claimed by the petitioner, and petitioner alleges that therein a manifest error has happened to the prejudice of petitioner. The said Supreme Court of the State of Georgia is the highest Court of the State of Georgia in which a decision in this suit and in this matter could be had.

Wherefore petitioner prays that a writ of error may issue in his behalf from the Supreme Court of the United States to the Supreme Court of the State of Georgia for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in the cause duly authenticated may be sent to the Supreme Court of the United States.

Petitioner further prays that said judgment of the Supreme Court of Georgia may be upon the filing of said writ of error super-
73 seded until said cause is determined and decided by the Supreme Court of the United States.

This 27th day of April 1917.

ANDREW D. BARBOUR,
By WM. W. OSBORNE,
A. A. LAWRENCE &
E. H. ABRAHAMS,
His Attorneys at Law.

Filed in office April 27, 1917. Z. D. Harrison, C. S. C., Ga.

74 In the Supreme Court of Georgia.

ANDREW D. BARBOUR, Plaintiff in Error,

vs.

STATE OF GEORGIA, Defendant in Error.

Andrew D. Barbour in connection with his petition in the above stated cause for writ of error makes the following assignments of error which he avers occurred in the judgment of the Supreme Court of the State of Georgia.

Andrew D. Barbour assigning error says that in the record and proceeding in the aforesaid case and in the judgment of the Supreme Court of Georgia there is manifest error in this:

1. The Supreme Court of the State of Georgia erred in affirming the judgment overruling the motion in arrest of judgment which alleged that the act of the General Assembly of the State of Georgia

upon which the prosecution in said case was based was repugnant to the due process, and equal protection of the law clause of the Fourteenth Amendment of the Constitution of the United States in that said statute made it unlawful for the plaintiff in error to have in his possession liquors which he had lawfully acquired and which it was lawful for him to acquire, own and possess prior to the passage of said Act of the General Assembly and prior to its effective date. The Supreme Court of the State of Georgia by its said judgment held that said Act of the General Assembly was not repugnant to the Fourteenth Amendment to the Constitution of the United States,
and plaintiff in error avers that the Supreme Court of the
75 State of Georgia committed error in so holding and now assigns same as error and says that the Supreme Court of the State of Georgia should have decided that said Act of the General Assembly of the State of Georgia was unconstitutional and erred in refusing so to do.

2. The Supreme Court of the State of Georgia in its said judgment held that said Act of the General Assembly applied to property lawfully acquired and lawfully owned prior to the passage of said Act of the General Assembly of the State of Georgia and before its effective date and held that the said Act of the General Assembly so construed did not contravene either the due process of law clause or the equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States. Plaintiff in error says that the Supreme Court of Georgia should have held that said Act of the General Assembly is repugnant to the due process clause and the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and should have granted him a new trial and declared said provision of the Act of the General Assembly of the State of Georgia, void and of no effect, and erred in refusing so to do.

Wherefore Andrew D. Barbour prays that the judgment of the Supreme Court of Georgia affirming the judgment of the Court below may be set aside and reversed.

WM. W. OSBORNE,
A. A. LAWRENCE &
E. H. ABRAHAMS,
Att'ys for Petitioner.

Filed in Office April 27, 1917. Z. D. Harrison, C. S. C., Ga.

76 In the Supreme Court of the State of Georgia.

ANDREW D. BARBOUR, Plaintiff in Error,

vs.

THE STATE OF GEORGIA, Defendant in Error.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Georgia.

This 27th day of April 1917 came Andrew D. Barbour and filed herein and presents to this Court a petition praying for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Georgia intended to be urged by him; praying also that a transcript of the record and proceedings and papers upon which the judgment was rendered, duly authenticated, might be sent to the Supreme Court of the United States and that a supersedeas may be granted upon the filing of the writ of error.

On consideration whereof this Court, being the Court rendering the judgment and passing the decree complained of and the undersigned as Chief Justice of said Court does hereby allow the writ of error.

The writ of error shall operate as a supersedeas from the date of its filing.

This 27th day of April 1917.

WM. H. FISH,
Chief Justice Supreme Court of Georgia.

Filed in office April 27, 1917. Z. D. Harrison, C. S. C., Ga.

77 In the Supreme Court of the United States.

ANDREW D. BARBOUR, Plaintiff in Error,

vs.

STATE OF GEORGIA, Defendant in Error.

Error from the Court of Appeals of the State of Georgia.

Know all men by these presents: That Andrew D. Barbour, principal and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the State of Georgia in the sum of $500.00 to be paid by the said Andrew D. Barbour, for which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and each of our successors and assigns firmly by these presents. Signed with our seal- and dated this 25th day of April 1917.

Whereas the above named Andrew D. Barbour has prosecuted a

writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Georgia;

Now therefore the condition of this obligation is such that if the above named Andrew D. Barbour shall prosecute the said writ of error to effect and answer all damages and costs should they fail to make good their plea, then this obligation to be void otherwise to remain in full force and virtue.

ANDREW D. BARBOUR [L. S.]
UNITED STATES FIDELITY & GUARANTY CO., [L. S.]
By GEO. S. HAINES, *Att'y in Fact.*

JNO. F. HASTY,
ALVA L. HERZOG,
Notary Public, Chatham Co., Ga.

Approved.
WM. H. FISH,
Chief Justice Supreme Court of Georgia.

Filed in office April 27, 1917. Z. D. Harrison, C. S. C., Ga.

78 In the Supreme Court of Georgia.

ANDREW D. BARBOUR, Plaintiff in Error,

vs.

THE STATE OF GEORGIA, Defendant in Error.

Præcipe.

The Clerk in making out a transcript for the writ of error to the Supreme Court of the United States in the above entitled cause will please include the following parts of the record:

1. The entire transcript of the record as filed in the Supreme Court which includes the original accusation or information together with the plea entered thereon, the verdict of the jury entered thereon and the endorsement of filing entered thereon.
2. The motion in arrest of judgment with the entries of filing and the several orders entered thereon including order overruling the same.
3. The original motion for new trial with the orders entered thereon and the order overruling the same.
4. The amended motion for new trial with the orders entered thereon.
5. The brief of evidence with the order approving the same.
6. The charge of the Court with the order approving the same.

Also the following parts of the record:

1. The original bill of exceptions filed in the City Court of Savannah.
2. The judgment of the Supreme Court.
3. The opinion of the Supreme Court rendered in said case.
4. The petition for writ of error and order allowing the writ.

79 5. The assignment of error.
6. The original writ of error.
7. The original citation and acknowledgment of service thereon.
8. The bond given upon the writ of error.
9. This præcipe.

WM. W. OSBORNE,
A. A. LAWRENCE,
E. H. ABRAHAMS,
Att'ys for Plaintiff in Error.

Due and legal services of the foregoing præcipe acknowledged. Copy received.

WALTER C. HARTRIDGE,
Sol. Gen., E. J. C., Ga.

Filed in office April 27, 1917. Z. D. Harrison, C. S. C., Ga.

80 CLERK'S OFFICE,
Supreme Court of Georgia:

ATLANTA, GA., May 4, 1917.

I hereby certify, that the foregoing pages hereto attached contain the original writ of error, citation and acknowledgement of service thereof, together with a true and complete transcript of those parts of the record in the case of Andrew D. Barbour, plaintiff in error, vs. The State of Georgia, defendant in error, which are required by the præcipe of the petitioner for writ of error to be sent to the Supreme Court of the United States, as appears from the records and files of this office.

Witness my signature and the Seal of the Supreme Court of Georgia hereto affixed the day and year above written.

Z. D. HARRISON,
Clerk of the Supreme Court of Georgia.

Endorsed on cover: File No. 25,957. Georgia Supreme Court. Term No. 1127. Andrew D. Barbour, plaintiff in error, vs. The State of Georgia. Filed May 14th, 1917. File No. 25,957.

19

Office Supreme Court, U. S.
FILED
DEC 23 1918
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 191.

ANDREW D. BARBOUR, PLAINTIFF IN ERROR,

vs.

STATE OF GEORGIA.

WRIT OF ERROR TO THE SUPREME COURT OF GEORGIA.

BRIEF AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

WILLIAM W. OSBORNE,
A. A. LAWRENCE,
Attorneys for Plaintiff in Error.

(25,957)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 191.

ANDREW D. BARBOUR, PLAINTIFF IN ERROR,

vs.

STATE OF GEORGIA, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF COUNSEL FOR PLAINTIFF IN ERROR.

Statement of the Case.

Andrew D. Barbour, hereinafter called defendant, was convicted of violation of section 16 of the act of the General Assembly of Georgia (see appendix (*a*)) which prohibits the possession at one time of more than one gallon of vinous liquor. (See fourth count of accusation, p. 5 of record.)

Except as showing defendant's innocent intention as to the use of the wine, we have no concern with any of the counts of the accusation other than the fourth, as defendant was acquitted upon all other counts. (See verdict of the jury, p. 6 of record.)

Defendant made the defense that he owned and possessed the wine prior to the passage and effective date of the act, and attacked it upon the assumption that it offended the Fourteenth Amendment to the Constitution of the United States, in that it destroyed his right to the possession of property which he had lawfully acquired prior to the passage of the statute. (See amended motion for new trial, p. 8 of the record; motion in arrest of judgment, p. 11 of the record, and defendant's statement, p. 19 of the record.)

The trial court held that it was within the police power of the State to make penal the possession of liquors lawfully owned and possessed before the date of the passage of the act and before the date upon which the act became effective. This decision of the trial judge was affirmed by the Supreme Court, two of the six justices dissenting. (See opinions of the court, pp. 25 to 28, of the record.)

To the judgment of the Supreme Court the defendant brings error.

Question to be Determined.

Whether a State statute, which makes penal the possession of property, that is to say, vinous liquors, lawfully acquired, prior to the passage of the act under which defendant was prosecuted, offends the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

Specifications of Error.

Andrew D. Barbour, assigning error, says that in the record and proceeding in the aforesaid case and in the judgment of the Supreme Court of Georgia there is manifest error in this:

1. The Supreme Court of the State of Georgia erred in affirming the judgment overruling the motion in arrest of judgment, which alleged that the act of the General As-

sembly of the State of Georgia, upon which the prosecution in said case, was repugnant to the due process and equal protection of the law clause of the Fourteenth Amendment of the Constitution of the United States, in that said statute made it unlawful for the plaintiff in error to have in his possession liquors which he had lawfully acquired and which it was lawful for him to acquire, own and possess prior to the passage of said act of the General Assembly and prior to its effective date. The Supreme Court of the State of Georgia, by its said judgment, held that said act of the General Assembly was not repugnant to the Fourteenth Amendment to the Constitution of the United States, and plaintiff in error avers that the Supreme Court of the State of Georgia committed error in so holding and now assigns the same as error and says that the Supreme Court of the State of Georgia should have decided that said act of the General Assembly of the State of Georgia was unconstitutional, and erred in refusing so to do.

2. The Supreme Court of the State of Georgia in its judgment held that said act of the General Assembly applied to property lawfully acquired and lawfully owned prior to the passage of said act of the General Assembly of the State of Georgia and before its effective date, and held that the said act of the General Assembly so construed did not contravene either the due process of law clause or the equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States. Plaintiff in error says that the Supreme Court of Georgia should have held that said act of the General Assembly is repugnant to the due process clause and the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and should have granted him a new trial, and declared said provision of the act of the General Assembly of the State of Georgia void and of no effect, and erred in refusing so to do.

Wherefore Andrew D. Barbour prays that the judgment of the Supreme Court of Georgia affirming the judgment of the court below be set aside and reversed.

BRIEF.

At the time defendant purchased the wine, for possessing which he was convicted, it was property and its ownership and possession was surrounded with every attribute incidental to property, and guaranteed by the State and Federal Constitution.

Fears *vs.* State, 102 Ga., 274.
Southern Express Co. *vs.* State, 107 Ga., 672-673.
Henderson *vs.* Heyward, 109 Ga., 376.
Southern Express Co. *vs.* Rose, 124 Ga., 593.
Padgett *vs.* State, 6 Ga. App., 564.

The moment the statute under consideration went into effect it, as construed by the Supreme Court of Georgia, divested all property rights and created a criminal liability upon defendant for retaining in his possession property which he had purchased and possessed under the sanction of the laws of the State and the United States.

The question, then, is whether the State may, under its police power, destroy property of this character without offending the due process clause of the Constitution.

This court has not heretofore had this question before it. In Crane *vs.* Campbell, 245 U. S., p. 304, it was held that the State could prohibit the possession of whiskey for personal use, but that case did not involve the possession of property secured prior to the passage of the law which made possession unlawful.

The same is true of the cases of Bartemeyer, 18 Wall., 129, and Boston Beer Company *vs.* Mass., 7 Otto, 32, where the court in the Bartemeyer case said:

> "But if it were true, and it was fairly presented to us that the defendant was the owner of the class of intoxicating liquor which he sold to Hickey, at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we concede that two very grave questions would

arise, namely: 1, whether this would be a statute depriving him of his property without due process of law; and secondly, whether, if it were so, it would be so far a violation of the Fourteenth Amendment in that regard as would call for judicial action by this court?"

In the Boston Beer Company case it is said:

> "We do not mean to say that property actually in existence and in which the right of the owner has become vested may be taken for the public good without due compensation. But we infer that the liquor in this case, as in the case of Bartemeyer *vs.* Iowa, 18 Wallace, 129, was not in existence when the liquor law of Massachusetts was passed. Had the plaintiff in error relied on the existence of the property prior to the law, it behooved it to show that fact. But no such fact is shown and no such point is taken."

That the question is fully and fairly presented in this case appears from the first portion of the opinion of the court below, which is as follows:

> "Among the provisions of the prohibition law enacted at the extraordinary session of the General Assembly in 1915, which became effective on May 1st, 1916, was that which forbids any person to have in his possession at any one time more than one gallon of vinous liquors. It was for a violation of this provision of the law that the plaintiff in error was sentenced. He insists that he possessed the wine prior to May first; that having acquired the wine when it was lawful to do so, and before his property rights were affected by the law, his possession was not a violation of the act; and that to consider the law as applying to liquor in possession before the law became effective, would be to give to it a construction repugnant to the Constitution of Georgia and the Fourteenth Amendment of the Constitution of the United States. That this contention is unsound we entertain no shadow of a doubt." (See p. 25, of the record.)

Before entering into an analysis of the reasons given by the court below, it is well to have in mind the following considerations:

The statute does not deny absolutely the right of property in intoxicating liquors. It recognizes the right to possess one gallon of vinous liquors. It recognizes spirituous, malt and vinous liquors as property and not as a nuisance *per se*.

So far as this case is concerned it must be conceded that the possessor was innocent of any purpose to use it in such manner as to create a nuisance, for Barbour was acquitted upon the counts which charge him with selling and keeping on hand for the purpose of sale.

The wine in defendant's possession was five bottles of port and three bottles of sherry, from which it is fairly, if not necessarily, inferable that it was merchandise imported in the regular course of commerce under the laws of the United States, and that all the laws of the United States as to customs and duties had been duly complied with.

From the foregoing facts it is further inferable that the bottles contained, and defendant had paid therefor and owned and possessed the duty and revenue stamps required by the United States Government.

Thus we have a case of property recognized as an article of commerce, the title to which was secured in accordance with the laws of the United States and the State of Georgia, possessed for a purpose lawful at the time it was acquired, and absolutely destroyed by legislative edict.

The lower court upheld this spoliation upon the theory that intoxicating liquors are so far the object of the police power of the State that they are not the subject of substantial property rights, and that even when lawfully acquired the title obtained is subject to inherent infirmities which permits the State to destroy the title it has permitted the citizen to acquire.

These conclusions were based by the court in large part upon the case of Mugler *vs.* Kansas, 123 U. S., 623, and the decisions following it.

We submit that neither the facts nor the reasoning of the Mugler case warrant such a conclusion. In fact the following single quotation contradicts such assertion:

> "The statute is prospective in its operation; that is, it does not put the brand of a common nuisance upon any place, unless, after its passage that place is kept and maintained for purposes declared by the legislature to be injurious to the community. Nor is the court required to adjudge any place to be a common nuisance simply because it is charged by the statute to be such. It must first find it to be of that character, that is, must ascertain in some legal mode, whether *since the statute was passed*, the place in question has been or is being so used as to make it a common nuisance." 123 U. S., p. 672. (Italics ours.)

Neither Mugler, Clark Distilling Co., 242 U. S., p. 311, nor the Crane case, 245 U. S., p. 304, deals with statutes which acted retrospectively. In those cases the subject-matter of the litigation arose subsequent to the enactment of the legislation.

We apprehend a wholly different result would have been reached in the Mugler case if the statute there involved had declared that persons possessing the brewery in question upon or after the date the statute went into effect were guilty of a crime.

We think the General Assembly of Georgia intended the statute under review to operate prospectively. But the Supreme Court of Georgia has ruled to the contrary in the following positive language (see p. 27 of the record, where it says):

> "For the reasons above stated the State may not only limit the quantity of liquor a person may possess, but it may forbid him to possess any at all,

whether acquired before the law became effective, or afterward, this power being a necessary incident to the main purpose of the legislation, and to the enforcement of the law. All provisions of this law are incidental to the main purpose. Ownership and property rights are distinct from the matter of possession. But neither ownership, nor property rights, nor possession will be permitted to hinder the operation of laws enacted for the public welfare."

The court further said on page 26 of the record:

> "The impairment of property value or destruction is not the primary object, but is permitted because it is necessarily incident to the main purpose. Intoxicating liquors being subject to the police power of the State, they are, even when lawfully acquired, *taken with their inherent infirmities, and subject to such legislation as may thereafter be enacted within the police powers of the State.* The ultimate purpose and end of prohibition is to prevent the use of liquor as a beverage. This ultimate end is approached step by step, and when the preponderent and prevailing morality of the nation believes that the public welfare demands the final step, the way will be found to accomplish the end." State *vs.* Phillips, 109 Miss., 22 (61 So., 651). (Italics ours.)

In support of this conclusion the court below cites cases of this court dealing with nuisances *per se*. We can readily see if it be admitted as a premise that wine, which was made by Christ and administered as a sacrament by all Christian people, and made an article of commerce by all civilized nations, is inherently and in advance of any statute a nuisance, then the court below was right in declaring that wine is such a nuisance that no property right recognized by the Fourteenth Amendment inured to it. But our position is that wine has from the dawn of civilization been a recognized article of commerce, useful in arts, mechanics and for scientific, medicinal and religious purposes. That its fu-

ture acquisition may be prohibited can no longer be questioned, but until some statute has been passed to change its status it retains the status of property given by common consent of mankind through the course of centuries. The cases of Fears *vs.* State, 102 Ga., 274, and the other cases cited on page 3 hereof recognize this status and embody it in the settled policy of the State. Under that policy and that status it was clothed with the protection afforded by the guarantees of the Fourteenth Amendment, and we insist that the State cannot alter this status under the guise of declaring that that which it had theretofore declared to be property was not property, but a noxious and unwholesome nuisance.

The very statute itself contradicts the announcement of the court that intoxicating liquors are inherently a nuisance, for it recognizes the right of property and the right to possess various specified amounts thereof.

We submit that when duties and revenues are paid upon wines their value inheres to the wines and the owner of the wines, after the duties have been paid, has a property right under the United States in the wines as affected by added value from the payment of duties, etc. This value the court below says the state may destroy.

The decision under review announces a dangerous application of the doctrine that innocent transactions may be prohibited to prevent their use as an aid to thwart the particular object. If this application of the doctrine be carried to its ultimate conclusion the State may destroy property rights in grain and fruits of every description lawfully acquired and innocently possessed, for the reason that such articles can be used for making wine and other alcoholic liquors—or it may go further and destroy the title to and make penal the possession of land which is capable of producing grain and fruits under the guise that it is necessary to prevent the land from being used to raise grain and fruit from which liquors, wines, and other intoxicating beverages may be manufactured.

It is no sufficient reply to say that the possibility of such situation is too remote to be considered. In this case the court below, in the opinion of the majority, said:

> "This ultimate end is approached step by step, and when the preponderant and prevailing morality of the nation belies that the public welfare demands the final step, the way will be found to accomplish the end."

By this declaration notice is given that no property right is sacred and no constitutional guarantee available as against the preponderant belief of the nation.

This announcement of the court below is wholly at variance with the decisions of this court and repugnant to its suggestions in the cases of Bartemeyer and Boston Beer Co., from which quotations are made on page 4 hereof.

This court has never held that a recognized article of commerce, brought into the United States in the ordinary course of trade, upon which duties have been paid and other incidents complied with, which make it property under the laws of the United States, contains such inherent infirmities that the State may, after such acquisition, destroy the owner's title and penalize his possession.

How can it be said that merchandise taxed as property by the United States Government, and having on it stamps which are the indication of property, having an added value by reason of the payment of duties, &c., which are in and of themselves property, contains such inherent infirmities, that the State may, under its police power, destroy the owner's property both in the merchandise and the stamps.

The situation is one "which ought to give us pause."

Neither morality nor public policy require a State to destroy property which has been acquired under the laws of the State and the United States and which has been put to no use which makes it a common nuisance or a menace to public health or public morals.

It would be immoral for the State, having permitted the citizen to acquire property, to force him to consume or destroy it. At the time the statute in question was passed it was unlawful in Georgia to sell wine. (See Code, section 426, Penal Code 1911, appendix (*b*).) He was permitted under the law to purchase and possess it for his own use or to be used in social intercourse. The effect of a law passed November 18th, to become effective May 1st, and construed as the court below has done, must have been to force the citizen either to consume his wines, which was an aid to insobriety, or to destroy it. This, we submit, was contrary to good morals and repugnant to the protection guaranteed by the Fourteenth Amendment.

We invite the attention of the court to the case of Wynehamer *vs.* the People, 13 N. Y. Reports, p. 378, in which there is a most extended discussion of this question.

The court there had under consideration the act of New York of 1856, which prohibited the sale of intoxicating liquors. The issue made before the court was whether the legislature could, under the due process clause of its Constitution, prohibit the sale of liquors owned and acquired prior to the enactment of the law. The court held that the legislature had no such power.

There were dissenting opinions, which maintained that the statute was constitutional. The dissenting opinion did not deny the right of property in the liquor or the inability of the legislature to destroy that property, but they held that the right of sale was not such an incident to the right of property as to make it a property right or its destruction a destruction of a property right.

For these reasons the statute as construed by the court below offends the due process clause of the Constitution.

In the opinion of the court there is a suggestion that the wine was acquired between the date of the passage of the act, on November 18, 1915, and the date upon which it, by its terms, became effective, to wit, May 1, 1916.

We do not think this is important, for no statute has force until the time it becomes effective.

36 Cyc., p. 1192, expresses it thus:

> "Until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the legislature and approved by the executive, has no force whatever for any purpose, and all acts purporting to have been done under it prior to that time are void."

Lewis-Sutherland's Statutory Construction expresses it thus:

> "Where a particular time for the commencement of a statute is appointed it only begins to have effect and to speak from that time, unless a different intention is manifest, and will speak and operate from the beginning of that day."

The language of the statute itself is as follows:

> "Be it further enacted, That this act shall take effect and be in force from and after May 1st, 1916."

So it must be said that property acquired before the statute became effective is just as much entitled to protection of the constitutional guarantees as if it were acquired prior to the passage of the act.

But the case at hand is not subject to such limitations. The point is squarely made that Barbour possessed the property prior to the passage of the act. While it is true he did not in his statement designate the date upon which he acquired the property other than to say he acquired it before May 1st, the effective date of the act, the sixth ground of the amended motion for new trial (see p. 9 of the record) raised the issue that the statute destroyed property acquired prior to the passage of the act, and so likewise did the fourth ground of the motion in arrest of judgment (p. 11 of the record) raise the same issue.

The issue was fairly and squarely presented by the motion in arrest that the wine was acquired prior to the passage of the act, and it was this that was decided by the court below.

So we submit that the minority of the court below were right and the judgment of the majority should be reversed.

Respectfully submitted,

WILLIAM W. OSBORNE,
A. A. LAWRENCE,
Attorneys for Plaintiff in Error.

APPENDIX (a).

"Sec. 16. Be it further enacted by the authority aforesaid, That it shall be unlawful for any person to receive, accept delivery of, possess or have in possession at one time, or within any period of thirty consecutive days, whether in one or more places, or whether in original packages, or otherwise, (1) more than one gallon of vinous liquor, or (2) more than six gallons (48 pints) of malted liquors or fermented liquors, such as beer, lager beer, ale, porter or other similar fermented or intoxicating or spirituous liquors either in bottles or other receptacles, or (3) more than two quarts of spirituous liquors or other intoxicating liquors, or other prohibited liquors beyond those named in sub-divisions one and two, above.

"But this section shall not apply to the receipt or possession of alcohol by persons who are permitted by law to possess, receive, sell or use the same, when received, possessed or sold in accordance with the rules and regulations prescribed by law."

"Sec. 29. Be it further enacted by the authority aforesaid, That any person, firm or corporation violating any provision of this act shall be guilty of a misdemeanor and punished as for a misdemeanor, as prescribed in section 1065 of the Penal Code of 1910."

"Sec. 30. Be it further enacted by the authority aforesaid, That this act shall take effect and be in force from and after May 1, 1916."

APPENDIX (b).

"426. Prohibition as to Intoxicating Liquors. From and after the first day of January, 1908, it shall not be lawful for any person within the limits of this State to sell or barter for valuable consideration, either directly or indirectly, or give away to induce trade at any place of business, or keep or furnish at any other public places, or manufacture, or keep on hand at their place of business any alcoholic, spirituous, malt or intoxicating liquors, or intoxicating bitters, or other drinks which, if drunk to excess, will produce intoxication; and any person so offending shall be guilty of a misdemeanor."

Office Supreme Court, U. S.
FILED
JAN 21 1907
JAMES H. MAHER,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 191.

ANDREW D. BARBOUR, PLAINTIFF IN ERROR,

vs.

STATE OF GEORGIA.

WRIT OF ERROR TO THE SUPREME COURT OF GEORGIA.

SUPPLEMENTAL BRIEF FOR THE PLAINTIFF IN ERROR.

WILLIAM W. OSBORNE,
A. A. LAWRENCE,
Attorneys for Plaintiff in Error.

(25,957)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 191.

ANDREW D. BARBOUR, PLAINTIFF IN ERROR,

vs.

STATE OF GEORGIA.

WRIT OF ERROR TO THE SUPREME COURT OF GEORGIA.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

The Conclusion of the Court Below was Erroneous, Because it was Based upon a False Premise.

The premise upon which the court below based its conclusion was, that property right in wines is not absolute, but only qualified, and taken subject to such legislation as the State might thereafter enact.

This, we insist, is opposed to the settled law of the land as announced by decisions of this court.

In the case of Bowman *vs.* Chicago Railroad, 125 U. S., 465, it was decided that beer was an article of commerce and that the property right of the owner was of such nature that

a statute of Iowa which prohibited beer being shipped into the State was repugnant to the commerce clause of the Constitution as a regulation of interstate commerce.

In Leisy *vs.* Harden, 135 U. S., 100, the case of Bowman *vs.* Chicago Railroad was affirmed, and it was decided that where intoxicating liquors were imported from one State into another the party importing them had the right to sell them in the original packages, and this because intoxicating liquor was a recognized article of commerce and was under the protection of the commerce clause of the Constitution, and when imported into a State was imported with all the incidents usually attaching to property.

In the opinion of the court it was said as to the nature of the property right in such liquor:

> "That ardent spirits, distilled liquors, ale and beer are subject to exchange, barter and traffic like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts is not denied. Being thus articles of commerce can a State in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State? Or when imported, prohibit their sale by the importer? If the importation cannot be prohibited without the consent of Congress when does property imported from abroad or from a sister State, so become part of the common mass of property within the State as to be subject to unimpeded control."

As said above, it was held that notwithstanding the State law the right of sale attached so long as the intoxicating liquors were contained in the original package.

In Vance *vs.* Vandercook, 170 U. S., 438, this court, following the Bowman and Leisy cases with respect to the nature of the property right of the owner of intoxicating liquors, said:

> "But the right of persons in one State to ship liquor into another State to a resident for his own use is derived from the Constitution of the United States,

and does not rest on the grant of the State law. Either the conditions attached by the State law unlawfully restrain the right or they do not. If they do—and we shall hereafter examine this contention—then they are. If they do not there is no lawful ground of complaint on the subject."

See also American Express Company *vs.* Iowa, 196 U. S., 133.

The decision of the court below cannot be reconciled with the foregoing decisions of this court.

Under the settled law as determined by this court, property right in liquors is derived, not by grant from the State, but under the Constitution of the United States.

It is true that the foregoing cases involved a conflict between the police power of the State and the commerce clause of the Constitution, while this case involves a conflict between the police power of the State and the due-process clause of the Constitution; but this is a distinction without a difference, and it is idle to say that property which is protected by the commerce clause is not protected by the due-process clause.

The judgment of the court below being based upon a false premise, it necessarily follows that its conclusion was erroneous.

The foregoing cases afford also a complete reply to the position assumed that if the liquors were acquired between November, 1915, the date of the approval, and May first, 1916, the effective date of the act, the act in question would not be retroactive.

We think we have shown on page 12 of our original brief that the case made by the record and decided by the court below was that of wine acquired before the passage of the act; but be this as it may, the argument that wines acquired between the date of the passage of the act and the date upon which it became effective have a different status from those acquired before the passage of the act is repugnant to the principles decided by the cases above cited.

Under the laws of Georgia as they existed between November, 1915, and May, 1916, it was lawful to acquire and possess intoxicating liquors in any quantity. Under the cases cited one acquiring such property acquired with it all the incidents and protection accorded to property by the Constitution, and in a conflict between the police power of the State and the Constitution the police power must give way.

Take for illustration the case of Bowman *vs.* Chicago and Northwestern R. R., 125 U. S., 465. In that case the statute of Iowa was already in existence. The police power of the State was not only declared, but in effect. This police power conflicted with the commerce clause of the Constitution and gave way before it. Likewise in this case, where the police power conflicts with the property clause of the Constitution, it must give way.

As hereinbefore observed, it is idle to say that there is a difference between this case and the Bowman case, because there the commerce clause was involved, while here the property clause is involved. The police power of the State is no more potential against the property clause than it is against the commerce clause.

It is true that since these decisions were rendered, Congress has removed the protection of the commerce clause from all classes of wines, beers, and liquors, but at the time the wine in question was acquired neither Congress nor the State of Georgia had in effect any law which touched its status as property, and it then had all the attributes of property which the beer involved in the Bowman case derived from the property clause of the Constitution, and there was at that time no power in the State to pass a law altering the status of such property when previously acquired.

Respectfully submitted,

WILLIAM W. OSBORNE,
ALEXANDER A. LAWRENCE,
Attorneys for Plaintiff in Error.

Supreme Court, U. S.
FILED
JAN 15 1916
JAMES D. MAHER,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 191.

ANDREW D. BARBOUR, PLAINTIFF IN ERROR,

vs.

STATE OF GEORGIA.

WRIT OF ERROR TO THE SUPREME COURT OF GEORGIA.

BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR.

CLIFFORD WALKER,
Attorney General,
Counsel for Defendant in Error.

(25,957)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 191.

ANDREW D. BARBOUR, PLAINTIFF IN ERROR,

vs.

THE STATE OF GEORGIA.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR.

"The mere possession of whiskey for personal use may be rendered criminal by State legislation without abridging privileges or immunities of citizens of the United States, or depriving a person of life, liberty, or property without due process of law."

Ed. Crane, Plff. in Err., *vs.* J. J. Campbell, Sheriff of Latah County, Idaho, 245 U. S. 304.

"The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question."

Lawton *vs.* Steele, 152 U. S. 143,
Silz *vs.* Hesterberg, 211 U. S. 31,
People *vs.* West, 106 N. Y. 293.

"If the lawful object warrants the discrimination the means adopted for making it effective also might be adopted."

Patsone *vs.* Penn., 232 U. S. 143,
Geer *vs.* Conn., 161 U. S. 519.

"It is not a good objection to a statute prohibiting a particular act and making its commission a public offense that the act was before the enactment lawful or even innocent and without any element of moral turpitude.

N. Y. *vs.* West, 106 N. Y. 293,
People *vs.* Cipperly, 101 N. Y. 634,
Comn. *vs.* Evans, 132 Mass. 11.

"The dangerous character of alcoholic liquors is recognized also by the courts. They have declared that intoxicating liquor in its nature is dangerous to the morals, good order, health and safety of the people, and is not to be placed on the same footing with the ordinary commodities of life.

State ex rel *vs.* Aiken, 42 S. C. 222,
20 S. E. 221, 26 L. R. A. 345,
Schwartz *vs.* People, 46 Colo. 239, 104 Pac. 92.

"It cannot be denied that the power of the State to protect the lives, health and property of its citizens and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

U. S. *vs.* E. C. Knight Co., 156 U. S. 1.

The foregoing principle has been applied by the Superior Court to prohibition against *possession* of certain things as a proper means to accomplish an ulterior valid purpose.

N. Y. ex rel Silz *vs.* Hesterberg, 211 U. S. 31,
Lawton V. Steele, 152 U. S. 133,
Patsone *vs.* Penn., 232 U. S. 138.

A state may prohibit the sale of non-intoxicating malt liquors if the legislature deems it a necessary means to suppress the trade in intoxicants.

Purity Extract & Tonic Co. *vs.* Lynch, 226 U. S. 192, and the cases cited.

"The exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest."

"The dangerous character of alcoholic liquor is universally recognized by the courts. The fact that it is an article fraught with such dangerous peril to the morals, good order, health and safety of the people places it upon a different plane from that of other kinds of business. It is well settled that in legislating in behalf of the public morals, health and safety, the State by reason of its police power may enact laws which incidentally impair property value (Mulger *vs.* Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205) or destroy it altogether.

Cureton *vs.* State, 135 Ga. 660 (70 S. E. 332, 49 L. R. A. (N. S.) 182),
Southern Ex. Co. *vs.* Whittle, 194 Ala. 406 (69 So. 652),

Glenn *vs.* Son. Ex. Co., 170 N. C. 286 (87 S. E. 136),

Preston *vs.* Drew, 33 Me. 558 (54 Am. D. 639),

Patsone *vs.* Pennsylvania, 232 U. S. 138 (34 Sup. Ct. 281, 58 L. Ed. 539),

Silz *vs.* Hesterberg, 211 U. S. 31 (29 Sup. Ct. 10, 53 L. Ed. 75),

Barbour *vs.* Georgia, 146 Ga. 868.

"Since the State has the power to prohibit the manufacture and sale, it also has the power, as an incident to the right, to restrain the means by which intoxicating liquors for personal use can be obtained. Clark Distilling Co. *vs.* Western Md. Ry. Co., 242 U. S. 311, 329 (37 Sup. Ct. 180, 61 L. Ed). It follows as an irresistible conclusion, that likewise the State may constitutionally prohibit the possession of intoxicating liquors, as an incident to the main purpose."

Barbour *vs.* State, 146 Ga. 569.

A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.

Booth *vs.* Illinois, 184 U. S. 425,
Mulger *vs.* Kansas, 123 U. S. 623, 661, 31 L. Ed. 205, 210, 8 Sup. Ct. Rep. 273,
Minnesota *vs.* Barber, 136 U. S. 313, 320, 34 L. Ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862,
Brimmer *vs.* Rebman, 138 U. S. 78, 34 L. Ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213,
Voigt *vs.* Wright, 141 U. S. 62, 35 L. Ed. 638, 11 Sup. Ct. Rep. 855, 46 L. Ed. U. S. 626.

Through dealing with a different subject matter, analagous reasoning is found in the line of cases, involving practically the same principles, defining the validity of contracts subject to state police regulations. Reference is made to the right of a State under its police powers to regulate rates charged by street railways, water and power companies, etc., even though there be an existing contract fixing rates. It has been held that there can be no inviolable contract where the law of the State in existence at the time the contract is claimed to have been made, itself makes the contract subject to change by the sovereign.

Chicago, etc., Rwy. *vs.* Franbarger, 238 U. S. 67,
State *vs.* Public Service Commission, 204 S. W. 497 (Supreme Court of Missouri, July 5, 1918),
Milwaukee, etc., Co. *vs.* Railroad Commission, 238 U. S. 174.

This principle applies in Georgia as its constitution expressly provides that "The exercise of the police power of the State shall never be abridged."

Constitution of Georgia, ¶2, §2, Art. 4, Code §6464.

The constitution of the State of Missouri contains exactly the same language. In interpreting this provision the Supreme Court of Missouri held that neither the Legislature nor a municipality could make an inviolable contract with a water company as to its rates; that a state could always step in and change these rates.

State *vs.* Public Service Commission, 204 S. W. 497.

To the same effect are decisions of the Georgia courts.

City of Dawson *vs.* Dawson, etc., Company, 137 Ga. 63;

Union Dry Goods Co. *vs.* R. R. Commission of Ga., 142 Ga. 841 (2), 142 Ga. 658.

This last decision has just this week been affirmed by the Supreme Court of the United States.

The principle applies with even greater force to cases involving the public health and public morals, as so clearly expressed by Justice Harlan in the case of New Orleans, etc., Co. *vs.* Louisiana, etc., Co., 115 U. S. 650.

"So far from the Courts saying (referring to the case in 111 U. S. 746) that the State could not make a valid contract in reference to any matter whatever within the reach of the police power, according to its largest definition, its language was:

"While we are not prepared to say that the legislature cannot make valid contracts on no

subject embraced in the largest definition of the police power, we think that in regard to two subjects so embraced it cannot by contract limit the exercise of those powers to the pr judice of the general welfare. They are the public health and the public morals. The preservation of these is so necessary to the best interests o. social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."

It follows, therefore, that in this case, even if "at time defendant purchased the wine, for possessing which he was convicted, it was property and its ownership and possession was surrounded with every attribute incidental to property and guaranteed by the State and Federal Constitution," as contended by the able counsel for the Plaintiff in Error, whenever the State should determine that the sale or the possession of intoxicants is "fraught with such dangerous perils to the morals, good order, health and safety of the people," it could under its police powers, impair the property value or even destroy it altogether.

The Constitution of Georgia expressly provides that its police powers cannot be abridged.

Constitution of Georgia, Art. 4, §2, ¶2.

The evil qualities of intoxicants are so inherent such intoxicants are taken and possessed subject to such legislation as the State may enact under its police power.

January 9, 1919.

CLIFFORD WALKER,
Attorney-General,
Counsel for Defendant in Error.

BARBOUR *v.* STATE OF GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 191. Submitted January 24, 1919.—Decided April 14, 1919.

One who acquires liquor after approval and before the effective date of a state law making its possession unlawful is not deprived by the law of his property without due process. P. 459.

It must be presumed that the liquor was acquired between those dates when the date of acquisition is not shown. *Id.*

Whether such a law would be constitutional as applied to one who acquired liquor before its enactment—not decided. P. 460.

A federal question which was not decided by the State Supreme Court because not so raised as to evoke its decision under the local practice will not be decided by this court. *Id.*

146 Georgia, 667, affirmed.

THE case is stated in the opinion.

Mr. William W. Osborne and *Mr. A. A. Lawrence* for plaintiff in error:

454. Argument for Plaintiff in Error.

Wine has from the dawn of civilization been a recognized article of commerce, useful in arts, mechanics and for scientific, medicinal and religious purposes. Its future acquisition may be prohibited, but until some statute has been passed to change its status it retains the status of property given by common consent of mankind through the course of centuries. Under that status it was clothed with the protection afforded by the guarantees of the Fourteenth Amendment, and we insist that the State cannot alter this status under the guise of declaring that that which it had theretofore declared to be property was not property, but a noxious and unwholesome nuisance.

The very statute itself contradicts the announcement of the court that intoxicating liquors are inherently a nuisance, for it recognizes the right of property and the right to possess various specified amounts thereof.

We submit that when duties and revenues are paid upon wines their value inheres in the wines and the owner has a property right under the United States. This value the court below says the State may destroy.

The decision under review announces a dangerous application of the doctrine that innocent transactions may be prohibited to prevent their use as an aid to thwart the particular object.

At the time the statute in question was passed it was unlawful in Georgia to sell wine. [See Code, § 426, Penal Code 1911, appendix (*b*).] One was permitted under the law to purchase and possess it for his own use or to be used in social intercourse. The effect of a law passed November 18th, to become effective May 1st, and construed as the court below has done, must have been to force the citizen either to consume his wines, which was an aid to insobriety, or to destroy them. This, we submit, was contrary to good morals and repugnant to the protection guaranteed by the Fourteenth Amendment.

We invite the attention of the court to the case of *Wynehamer* v. *People*, 13 N. Y. 378, in which there is a most extended discussion of this question.

In the opinion of the court there is a suggestion that the wine was acquired between the date of the passage of the act, and the date upon which it, by its terms, became effective. We do not think this is important, for no statute has force until the time it becomes effective. 36 Cyc. p. 1192; Lewis, Sutherland's Statutory Construction. Property acquired before the statute became effective is just as much entitled to protection of the constitutional guarantees as if it were acquired prior to the passage of the act.

The premise upon which the court below based its conclusion was, that property right in wines is not absolute, but only qualified, and taken subject to such legislation as the State might thereafter enact. This, we insist, is opposed to the settled law of the land as announced by decisions of this court. *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *Vance* v. *Vandercook Co.*, 170 U. S. 438.

Property right in liquors is derived, not by grant from the State, but under the Constitution of the United States.

It is true that the foregoing cases involved a conflict between the police power of the State and the commerce clause, while this case involves a conflict between the police power and the due process clause; but this is a distinction without a difference.

The foregoing cases afford a complete reply to the position assumed that if the liquors were acquired between the date of the approval and the effective date of the act, the act in question would not be retroactive.

Under the laws of Georgia as they existed between November, 1915, and May, 1916, it was lawful to ac-

quire and possess intoxicating liquors in any quantity. Under the cases cited one acquiring such property acquired with it all the incidents and protection accorded to property by the Constitution, and in a conflict between the police power of the State and the Constitution the police power must give way. *Bowman* v. *Chicago & Northwestern Ry. Co., supra.*

Mr. Clifford Walker, Attorney General of the State of Georgia, for defendant in error:

The mere possession of whiskey for personal use may be rendered criminal by state legislature. *Crane* v. *Campbell,* 245 U. S. 304.

The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question. *Lawton* v. *Steele,* 152 U. S. 133; *Silz* v. *Hesterberg,* 211 U. S. 31; *People* v. *West,* 106 N. Y. 293.

If the lawful object warrants the discrimination the means adopted for making it effective also may be adopted. *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Geer* v. *Connecticut,* 161 U. S. 519.

It is not a good objection to a statute prohibiting a particular act and making its commission a public offense that the act was before the enactment lawful or even innocent and without any element of moral turpitude. *People* v. *West, supra; People* v. *Cipperly,* 101 N. Y. 634; *Commonwealth* v. *Evans,* 132 Massachusetts, 11.

Intoxicating liquor being dangerous to the morals, good order, health and safety of the people, is not to be placed on the same footing with the ordinary commodities of life. *State* v. *Aiken,* 42 S. Car. 222; *Schwartz* v. *People,* 46 Colorado, 239.

The police power is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the

Constitution of the United States, and essentially exclusive. *United States* v. *Knight Co.*, 156 U. S. 1. This principle applies to prohibiting possession of certain things as a proper means to accomplish an ulterior valid purpose. *Silz* v. *Hesterberg, supra; Lawton* v. *Steele, supra; Patsone* v. *Pennsylvania*, 232 U. S. 138.

A State may prohibit the sale of non-intoxicating malt liquors if the legislature deems it a necessary means to suppress the trade in intoxicants. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192.

It is well settled that in legislating in behalf of the public morals, health and safety, the State by reason of its police power may enact laws which incidentally impair property value, *Mugler* v. *Kansas*, 123 U. S. 623; or destroy it altogether, *Cureton* v. *State*, 135 Georgia, 660; *Southern Express Co.* v. *Whittle*, 194 Alabama, 406; *Glenn* v. *Southern Express Co.*, 170 N. Car. 286; *Preston* v. *Drew*, 33 Maine, 558; *Patsone* v. *Pennsylvania, supra; Silz* v. *Hesterberg, supra; Barbour* v. *State*, 146 Georgia, 667.

The State has the power to prohibit the manufacture and sale; it also has the power, as an incident to the right, to restrain the means by which intoxicating liquors for personal use can be obtained. *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311.

The constitution of the State of Georgia expressly provides that its police powers cannot be abridged. Const., Art. IV, § 2, par. 2. Intoxicants, because of their inherent evil qualities, are taken and possessed subject to such legislation as the State may enact under its police power.

Mr. Justice Brandeis delivered the opinion of the court.

The Georgia prohibitory liquor law was approved November 18, 1915; but, by its terms, did not become effec-

tive until May 1, 1916. Under it Barbour was convicted for having in his possession on June 10, 1916, more than one gallon of vinous liquor. (Georgia Laws, Extraordinary Session, 1915, Part 1, Title 2, No. 4, §§ 16 & 30, pp. 90, 99, 105.) He asserted that the liquor had been acquired by him before May first; and contended that the statute, if construed to apply to liquor so acquired, was void under the Fourteenth Amendment. The Supreme Court of the State overruled this contention and affirmed the sentence. 146 Georgia, 667. The case comes here on writ of error under § 237 of the Judicial Code.

That a State which has enacted a prohibitory law may forbid the mere possession of liquor within its borders was decided in *Crane* v. *Campbell*, 245 U. S. 304; but it did not appear there when the liquor had been acquired. Whether the prohibition of sale may be constitutionally applied to liquor acquired before the enactment of the statute was raised in *Bartemeyer* v. *Iowa*, 18 Wall. 129, and *Beer Company* v. *Massachusetts*, 97 U. S. 25, 32–33; but was not decided. The question presented here however is simpler. For the exact date when Barbour acquired the liquor is not shown; and we must assume, as the Supreme Court of Georgia did, that it was acquired during the period of five months and twelve days between the enactment of the law and the date when it became effective. Does the Fourteenth Amendment, by its guarantee to property, prevent a State from protecting its citizens from liquor so acquired?

A State having the power to forbid the manufacture, sale, and possession of liquor within its borders may, if it concludes to exercise the power, obviously postpone the date when the prohibition shall become effective, in order that those engaged in the business and others may adjust themselves to the new conditions. Whoever acquires, after the enactment of the statute, property thus declared noxious, takes it with full notice of its infirmity and that

after a day certain its possession will, by mere lapse of time, become a crime. It is well settled that the Federal Constitution does not enable one to stay the exercise of a State's police power by entering into a contract under such circumstances. *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611, 615. Compare *Calder* v. *Michigan*, 218 U. S. 591, 599. Nor can he do so by acquiring property.

The defendant raised, in his amended motion for a new trial, the further objection that the law was unconstitutional as applied to him, because the liquor had been acquired before the statute was enacted; but the trial judge denied the motion and declined to approve any of the grounds on which it was based. In accordance with the state practice its Supreme Court therefore refused to consider the point. *Dickens* v. *State*, 137 Georgia, 523; *Harris* v. *State*, 120 Georgia, 196, 197. Consequently the question is not before us, *Louisville & Nashville R. R. Co.* v. *Woodford*, 234 U. S. 46, 51; and on it we express no opinion.

The judgment of the Supreme Court of Georgia is

Affirmed.